No. 89-5916-CFX
Status: GRANTED

Title: Richard Demarest, Petitioner
v.
James Manspeaker, et al.

Docketed:
October 28, 1989

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Scarboro,James E.S.

Counsel for respondent: Woodard,Duane, Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Oct 28 1989	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Nov 30 1989		DISTRIBUTED. January 5, 1990
4	Dec 29 1989	P	Response requested -- WJB, HAB, JPS, SOC. (Due January 29, 1990)
6	Mar 14 1990		Order extending time to file response to petition until March 29, 1990.
7	Mar 29 1990		Brief of respondent United States in opposition filed.
8	Apr 5 1990		REDISTRIBUTED. April 20, 1990
10	Apr 23 1990		Petition GRANTED.
			**********
11	May 2 1990	G	Motion of petitioner for appointment of counsel filed.
12	May 14 1990		Motion for appointment of counsel GRANTED and it is ordered that James E. Scarboro, Esquire, of Denver, Colorado, is appointed to serve as counsel for the petitioner in this case.
13	Jun 22 1990		Joint appendix filed.
14	Jul 13 1990		Brief of petitioner Demarest filed.
15	Aug 13 1990		Brief of respondent United States in opposition filed.
16	Aug 17 1990		Record filed.
		*	USCA 10-1 volume
17	Aug 28 1990		CIRCULATED.
18	Sep 26 1990	X	Reply brief of petitioner Demarest filed.
19	Sep 26 1990		SET FOR ARGUMENT TUESDAY, NOVEMBER 6, 1990. (3RD CASE)
20	Nov 6 1990		ARGUED.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989 89-5916

No. _____

RICHARD S. DEMAREST,

Petitioner,

v.

JAMES MANSPEAKER, ET AL,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Richard S. Demarest, asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Petitioner has previously geen granted leave to so proceed in both the United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit.

Petitioner's affidavit in support of this motion is attached hereto.

Dated: October 25, 1989

Respectfully submitted,

Richard S Demarest

Richard S. Demarest
Petitioner, pro se
Register 48201
Box 1000 AVCF Unit 1-C
Crowley, CO 81034

OCT 2 1989

39 pp

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

No. 89-5916

RICHARD S. DEMAREST,

Petitioner,

v.

JAMES MANSPEAKER, ET AL,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Richard S. Demarest being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed on certiorari to the Tenth Circuit Court of Appeals without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of bringing certiorari are true.

1. Are you presently employed? YES I am employed as a clerk at the Arkansas Valley Correction Facility of the Colorado Department of Corrections, Crowley, Colorado and receive approximately $40.00 per month in compensation.

2. Have your received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? YES I have received birthday gifts totaling approximately $70.00.

3. Do you own any cash or checking or savings account? YES I have a prison account wherein approximately $24.00 is on deposit.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Barbara Bruneau -- Former Spouse
Bradley Michael Demarest -- Natural Son by Marriage

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Richard S. Demarest
Petitioner, pro se
Register 48201
Box 1000 AVCF Unit 1-C
Crowley, CO 81034

Subscribed and sworn to before me this 25th day of October, 1989.

Allen McGrath -- Notary Public
Box 1000
Crowley, CO 81034

My commission expires: May 24, 1992

No. 89-5916

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

RICHARD S. DEMAREST, PETITIONER

v.

JAMES MANSPEAKER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Richard S. Demarest
Register 48201
Box 1000 A.V.C.F. Unit 1-C
12750 Hwy. 96, Lane 13
Crowley, CO 81034
(719) 267-3520

PETITIONER, PRO SE

QUESTIONS PRESENTED FOR REVIEW

IS A MATERIAL WITNESS WHO IS A CONVICTED FELON -- IN PHYSICAL CUSTODY IN A STATE OR FEDERAL PRISON -- ENTITLED TO THE SAME WITNESS FEE ALLOWANCE AS IS A MATERIAL WITNESS WHO IS NOT A CONVICTED FELON, BUT OTHERWISE DETAINED, PURSUANT TO 28 U.S.C. 1821(a)(1) and (b)?

PARTIES TO THIS PROCEEDING

The only other party not listed in the caption is the Respondent Clerk of the District Court for the District of Colorado whose first name is Cathy and whose true last name is unknown to Petitioner. Joined co-appellants in the Court of Appeals for the Tenth Circuit were Edgar Lee Durre, Ronald Reece and Elizabeth Durre, parties whose intention as to certiorari review are unknown to Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

No. _____

RICHARD S. DEMAREST, PETITIONER

v.

JAMES MANSPEAKER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Richard S. Demarest, pro se, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit where he, an inmate witness in a federal trial, was denied statutorily mandated compensation for his presence.

OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado (App. "A") is not reported. The opinion of the United States Court of Appeals for the Tenth Circuit (App. "B") is reported at ___ F.2d ___.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit (App. "B", majority at 7) was entered on September 5, 1989. A timely filed petition for rehearing (App. "C") was denied

on October 23, 1989. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Chapter 119 of Title 28, United States Code, Judiciary and Judicial Procedure, as amended May 10, 1949, c. 96, 63 Stat. 65; May 24, 1949, c. 139, sec. 94, 63 Stat. 103; October 31, 1951, c. 655, sec. 51(a), 65 Stat. 727; September 3, 1954, c. 1263, sec. 45, 68 Stat. 1242; August 1, 1956, c. 826, 70 Stat. 798, codified at 28 U.S.C. 1821 (1966) ed., in relevant part (full text set forth in Appendix "D", infra):

> ... Witnesses who are not salaried employees of the Government and who are not in custody ...
>
> When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his substance, to a compensation of $1 per day.

2. Chapter 119 of Title 28, United States Code, Judiciary and Judicial Procedure, as amended May 10, 1949, c. 96, 63 Stat. 65; May 24, 1949, c. 139, sec. 94, 63 Stat. 103; October 31, 1951, c. 655, sec. 51(a), 65 Stat. 727; September 3, 1954, c. 1263, sec. 45, 68 Stat. 1242; August 1, 1956, c. 826, 70 Stat. 798; March 27, 1968, Pub.L. 90-274, sec 102(b), 82 Stat. 62; October 27, 1978, Pub.L. 95-535, sec. 1, 92 Stat. 2033, codified at 28 U.S.C. 1821 (1966) ed., (1988) Cum.Supp., in relevant part (full text set forth in Appendix "E", infra):

> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.
>
> (b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.
>
> (d)(1) A subsistence allowance shall be paid to any witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such

> place is so far removed from the residence of such witness as to prohibit return thereto from day to day.
>
> (4) When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.
>
> (e) An alien who has been paroled into the United States for prosecution pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 242(b) of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section.

3. Chapter 119 of Title 28, United States Code, Judiciary and Judicial Procedure, as amended September 2, 1965, Pub.L. 89-162, 79 Stat. 618; November 14, 1986, Pub.L. 99-651, Title I, sec. 104, 100 Stat. 3645, codified at 28 U.S.C. 1825 (1966) ed., (1988) Cum.Supp., in relevant part (full text set forth in Appendix "F", infra):

> (a) In any case in which the United States or an officer or agency of the United States is a party, the United States marshal for the district shall pay all fees of witnesses on the certificate of the United States attorney or assistant United States attorney, and in the proceedings before a United States magistrate, on the certificate of such magistrate, except that any fees of defense witnesses, other than experts, appearing pursuant to subpoenas issued upon approval of the court, shall be paid by the United States marshal for the district --
>
> > (2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in a criminal case in which a defendant is represented by such other counsel.

STATEMENT OF THE CASE

After testifying as a defense witness in a federal criminal trial, petitioner, a confined state inmate, requested that the clerk of the court prepare certification pursuant to 28 U.S.C. 1825(a)(2) and forward same to the United States Marshal for payment of daily

witness fees pursuant to 28 U.S.C. 1821(a)(1) and (b). The trial in which petitioner testified had the United States as a party and the defendant represented by counsel appointed pursuant to 18 U.S.C. 3006A.

Petitioner was one of several state inmates brought under Writ of Habeas Corpus ad Testificandum from various Colorado state prison facilities to testify at the federal trial, but was the only inmate called having no involvement in or knowledge of the charged crime: his testimony concerned matters apart from the actual crime as stipulated by the United States Attorney in open court.

The certification was not perfected and petitioner filed a "Petition for Review of Acts and Omissions of Clerks of the District Court or, in the Alternative, Complaint for Relief in the Nature of Mandamus" in the federal district court. In denying the petition and dismissing the complaint, Chief Judge Sherman G. Finesilver cited three non-dispositive federal appellate court rulings as supporting his determination of the issue. (App. "A", pp. 1-2).

Timely notice of appeal was filed on the final order of the district court and petitioner filed his opening brief while three other state inmates, also called as witnesses in the same federal proceeding, additionally filed independent appeals and briefs on the their own denials of witness fee claims.

By a 2-to-1 margin, the Tenth Circuit affirmed the lower court's decision and expanded on the issue by interpretation of statute.

(App. "B", majority pp. 1-7). In a sharply worded dissent, objection was made to interpretation of a statute that was without ambiguity and upon an issue the general context of which had been substantially determined by this Court in 1973. (App. "B", dissent pp. 1-7).

A subsequent Petition for Rehearing was filed and denied. (App. "C", p. 1).

Federal jurisdiction in the court of first instance was pursuant to 28 U.S.C. 1331.

REASONS FOR GRANTING THE PETITION

Here, as in Hurtado v. United States, 410 U.S. 578 (1973), the issue of witness fees for the incarcerated witness is again before the Court. In this case however, the question is whether the incarcerated witness who is specifically a convicted felon in the physical custody of a state or federal prison, and not merely a witness incarcerated by inability to make a bond, is entitled to the same witness fee compensation as the latter pursuant to 28 U.S.C. 1821(a)(1) and (b).

Subsections (a)(1) and (b) of title 28 U.S.C. 1821 are clear in their language and unambiguous yet previously interpreted as excluding convicted felon/inmates from witness fees by the Third, Fifth, Eleventh Circuits, the Court of Claims, and most recently in the Tenth Circuit against the petitioner.

Erroneous interpretations of 28 U.S.C. 1821 as they apply to prisoners will continue to arise due in part to the increased literacy among America's burgeoning prison populations where society's litigious nature places more and more inmates in the witness dock with each passing day. As recently observed,

> [t]he galloping growth in the number of prisoners in the United States continues to gain speed, and there is no end in sight. In the first half of 1989, the nation's prison systems grew by 46,004 inmates -- a six month increase of 7.3 percent that put 673,565 men and women in state and federal custody.

Strasser & Kaplan, Washington Brief, Nat'l L.J., September 25, 1989, at 27, col.3.

Some 3.4 million persons, two percent of this nation's population, are under some form of correctional control. Nat'l L.J., August 7, 1989, (Supplement--CRIME IN AMERICA), at S4, col.2.

It is therefore incumbent on this Court to clarify the statute and answer the question of whether a convicted felon/inmate is precluded from witness fees despite the plain language of statute.

This Court held in 1973 that persons unable to make bond to assure personal appearance as a material witness were entitled to witness fees, not only for that time actually involved in giving testimony, but also during such time as being held "when there is a court in session that he is to attend, and when he is in necessary attendance on that court." Hurtado, supra at 583. The Court, however, left open the question of entitlement to the fees prescribed by statute when s/he is a convicted felon/inmate.

Petitioner's claim was predicated on the determination by this Court that "[t]he statute provides [$30] per diem compensation to a witness who is in necessary attendance on a court, but that fee is payable to any witness, incarcerated or not." Hurtado, supra. at 590. (emphasis added).

Since the Court's 1973 decision, the Congress modified the amount of compensation in question from $20.00 per day to $30.00 per day without qualification or definition as to convicted felon/inmate entitlement. In the 1978 reorganization, no exclusions were made as to the convicted felon that was incarcerated in a penal facility at the time called to witness. In pertinent part, 28 U.S.C. 1821 in its text on August 1, 1956, comprised two paragraphs. Language within the first paragraph considering custodial status said:

> ... [w]itnesses who are not salaried employees of the Government and who are not in custody ...

and in the second,

> [w]hen a witness is detained in prison for want of security for his appearance, ...

engendered no restriction, but in fact provided for additional allowances. (emphasis added) In its current form, 28 U.S.C. 1821 incorporates specific exclusions where, in subparagraph (d)(1) the subsistence allowance alone is disallowed from an incarcerated witness and in subparagraph (e) there is the in toto exclusion for the alien paroled into the United States for prosecution pursuant to 8 U.S.C. 1182(d)(5) and for the alien deportable pursuant to 8 U.S.C. 1252(b).

The Tenth Circuit interpreted the lack of a definitive expression -- of convicted felon/inmate witness fee exclusion by the Congress in the statute's 1978 reorganization -- as permitting the Circuit to read the amendment by implication, a policy dis-favored by the Court. United States v. Welden, 377 U.S. 95, 103 n.12 (1964). Curiously, the lower court also made the observation that subsections (a)(1) and (b) contained "unqualified wording." (App. "B", majority at 4).

The word "witnesses" appears throughout its legislative and applied statutory history to be non-exclusive of the convicted felon/inmate such as this petitioner, thus illustrating Congress' original intent that the statute be all-witness inclusive. It provided, "... to the witnesses summoned in any court of the United States, the same allowance as is above provided for jurors." Hurtado , supra at 583 n.5 '1973) citing Act of Feb. 28, 1799, c. 19, sec. 6, 1 Stat. 626. (emphasis added).

The elemental language of, and the key to subparagraphs (a)(1) and (b), is use of the letter "a" modifying the word "witness." "A" is: "²a(1)--used as a function word before most singular nouns other than proper and mass nouns when the individual in question is undetermined, unidentified, or unspecified ..." Webster's Third New International Dictionary 1 (1980), (emphasis added).

The Tenth Circuit majority relied on decisions of three circuit courts and the Court of Claims to hold petitioner ineligible for witness fees: United States v. Garmany, 762 F.2d 929 (1985), cert. denied, 474 U.S. 1062 (1986): In re Grand Jury Matter (Witness

RW), 697 F.2d 103 (3rd Cir. 1982) affirming In re Witness Fees for Prisoner, 533 F.Supp. 401 (E.D. Pa. 1982); Marchese v. United States, 453 F.2d 1268 (Ct.Cl. 1972); and Meadows v. United States Marshal, 434 F.2d 1007 (5th Cir. 1970), cert. denied, 401 U.S. 1014 (1971). As observed in the Tenth Circuit dissent, "none of those cases contains an analysis of the plain language of the statute or an explanation of why the unambiguous text should not be given effect." (App. "B", dissent at 4).

The Fifth Circuit recognized no authority that explicitly approved witness fees for a federal prisoner and, as the Tenth Circuit in petitioner's claim, elected to use that absence of authority to construct a dis-entitlement. Meadows, supra at 1008. The Court of Claims in 1972 followed the lead of the Meadows court, incorporated their rationale the Congress had suggested a result -- again without explicit language -- and denied the fees entitlement in the context that a prisoner had nothing to lose. Marchese, supra at 1271. These cases were both determined prior to the Court's opinion in Hurtado and the 1978 Congressional amendments to the statute. In 1982, the fee issue came before the Third Circuit in conjunction with a subpoena bringing forth a witness to provide non-testimonial identification in the form of fingerprints. This summoning was to a grand jury, not a criminal trial. In re Witness Fees, supra. Relying on the Meadows and Marchese decisions and construing Hurtado to be limited only to the non-convicted witness, statutory fees were again denied. Witness Fees, supra at 402-03, affirmed In re Grand Jury, supra. Witness Fees advanced the theory of distinction between the

convicted felon/inmate and non-incarcerated witness. Notwithstanding, the rationale, the case cannot be dispositive as this petitioner was summoned to a criminal trial, not merely pretrial and non-testimonial identification grand jury examination. The issue in Garmany, supra, concerned a non-indigent criminal defendant seeking the presence of proposed inmate witnesses from across the federal prison system. This case is distinguished and inapposite from petitioner's claim in that the costs of producing the proposed witnesses exceeded $5,000.00 and involved third parties. In this case, as in all others preceding it, interpretations were read into what was clear statutory language. Only the Third Circuit noted the difficulty engendered by the language of subsections (d)(1) and (e) and the inconclusive legislative history. (App. "B", dissent at 4 citing Witness Fees and its affirming opinion).

The early history respecting prisoner-witness fees is admittedly scant. In the late 1800's case of In re Addis, 28 F. 794 (D.C.S.C. 1886), a defendant in attendance upon court under indictment, under recognizance, who was also under recognizance as a witness in another case was entitled to mileage and witness fees for attendance in the latter case. In a case similar to the facts before this Court in Hurtado, supra, a witness before court in the District of Columbia in 1802 who, for want of surety to appear and testify, was imprisoned and entitled to the daily compensation for his period of imprisonment. Higginson's Case, Fed.Cas.No. 6,471 (D.C.Dist.Col. 1802). Though neither of these two cases establish a mandatory precedent, by lack of inference that prisoners are

excluded from witness fees, a presumption can be adopted that prisoners were in fact included as being eligible for fees without consideration.

To date, no authoritative interpretation has been made on the convicted felon/inmate witness fee entitlement issue left open by the Court in 1973. With dissension between four of the eleven circuits and the Court of Claims with the plain language of the statute, and the absence of case law in the remaining circuits perhaps indicating "that other courts and litigants have not doubted the plain meaning of the statute," In re Stringer, 847 F.2d 549, 551 n.2 (9th Cir. 1988), this issue is ripe for conclusive determination by the Court at this time.

In it's 1978 amendments to 28 U.S.C. 1821, Congress had before it the conclusions made in Marchese v. United States, 453 F.2d 1268 (Ct.Cl. 1972): Meadows v. United States Marshall, 434 F.2d 1007 (5th Cir. 1970), cert. denied, 401 U.S. 1014 (1971) as well as Hurtado v. United States, 410 U.S. 578 (1973). Nonetheless, the Congress saw fit to not explicitly exclude the convicted felon/inmate and, in incorporating substantially the preexisting phraseology, performed the functional equivalent of codifying its earlier construction. Lorillard v. Pons, 434 U.S. 575, 580-81 (1978). Without the clearly expressed exclusion, the statute's language must be regarded as conclusive. Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). This Court has expressed its reluctance to draw inferences from Congress' failure to act, Schneidewind v. ANR Pipeline Co., 485

U.S. 293, ___, 108 S.Ct. 1145, 1154 (1988) and should in this instance re-affirm that principle by ruling that the language means what it says and not as interpreted by vague insinuation in the circuits.

Respecting the incarcerated witness, the Court, in dicta, recognized that separate subparagraphs in the statute created exceptions for subsistence, Hurtado, supra, at 581 and, because the Congress included "'particular language in one section of [the] statute but omit[ted] it in another section of the same Act, it is generally presumed that Congress act[ed] intentionally and purposely in the disparate inclusion or exclusion.'" Russello v. United States, 464 U.S. 16, 23 (1983) quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972).

"Congress' silence is just that--silence," Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987). Its "silence, no matter how 'clanging,' cannot override the words of the statute," and its intent is therefore "best determined by the statutory language that it chooses." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.13 (1985); (App. "B", dissent pp.1, 5).

The Court cannot disregard what Congress plainly and intentionally provided, CIR v. Asphalt Products Co., Inc., 482 U.S. 117, ___, 107 S.Ct. 2275, 2278 (1987), and cannot substitute its statutory construction when that duty properly "belongs to Congress." Hurtado, supra at 591.

The Tenth Circuit was obligated to defer to Congress and to apply the plain and ordinary meaning of words, rather than a hypothesize with speculation when the words themselves are clear. Palestine Information Office v. Shultz, 674 F.Supp. 910, 917 (D.D.C. 1987). Further, "if the language of a statute is clear, that language must be given effect--at least in the absence of a patent absurdity. (citations omitted). Judges interpret laws rather than reconstruct the legislators' intentions. Where the language of those laws is clear, [the Tenth Circuit was] not free to replace it with an unenacted legislative intent." I.N.S. v. Cardoza Fonseca, 480 U.S. 421, ___, 107 S.Ct. 1207, 1224 (1987) (Scalia, J., concurring). There is no "patent absurdity" in the instant case and, "where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" United States v. Ron Pair Enterprises, Inc., ___ U.S. ___, ___, 109 S.Ct. 1026, 1030 (1989) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917).

The gist of the applicable canon of statutory construction that should be followed by this Court is:

> [p]rovisions of the original act or section which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law ...
>
> ... Words and provisions used in the original act or section are presumed to be used in the same sense in the amendment. Moreover, the legislature is presumed to know the prior construction of the original act, and if words or provisions in the act or section amended that had been previously construed are repeated in the amendment, it is held that the legislature adopted the prior construction of the word or provision.

IA C. Sands, Sutherland on Statutory Construction, sec. 22.33 (4th ed. 1985).

There are numerous presumptions attached to the construction of a statute: presumptions supporting reversal of the instant opinion. See, e.g., 82 C.J.S. Statutes, sec. 316 (1953), where presumptions include:

> [t]hat a legislature, in passing a statute, knew its own intention, and knew the rules of statutory construction, and that the act, when couched in unambiguous language, fully expresses that intention. It has also been presumed that the legislature acted with deliberation, with knowledge of the effect of its act, and with a purpose in view, and that the provisions of the act were formulated in harmony therewith.
>
> It is also presumed that the legislature had, and acted with respect to, full knowledge and information as to the subject matter of the statute and the existing conditions and relevant facts relating thereto, as to prior and existing law and legislation on the subject of the statute and the existing condition thereof, as to the judicial decisions with respect to such prior and existing law and legislation, and as to the construction placed on the previous law by executive officers acting under it; and a legislative judgment is presumed to be supported by facts known to the legislature, unless facts judicially known or proved preclude that possibility.
>
> . . .
>
> So, also, presumptions are indulged against contradictory provisions or enactments, or uncertainty, or inadvertent omissions or oversights ...

See also, e.g., Lorillard v. Pons, 434 U.S. 575, 580-81 (1978).

The Tenth Circuit majority opined concerns for the potential abuse by the specific class, inmate witnesses, some members of which might testify for the sole purpose of illegitimate financial gain, (App. "B", majority at 6-7); a point recognized in dissent. (App.

"B", dissent at 6). These concerns do not fall as the task of a court to correct, but "belongs to Congress, not us." (App. "B", dissent, Id.). The mere fact that some additional measure dreamed up by the Court -- i.e., the general suppression of inmate witness fee eligibility based on an empirically hypothetical misuse -- would further an objective of the statute does not mean that, in enacting the statute, Congress intended to adopt the additional measure. Chilkat Indian Village v. Johnson, 643 F.Supp. 535, 537 (D. Alaska 1986). The position taken by the Tenth Circuit in this case manifests a flagrant repudiation of the standards set by this Court regarding the application of statutes as opposed to invoking their own views of the governing standards set forth in clear and unambiguous language.

Thus, the cases determined prior to the 1978 amendment were considered by Congress: the lack of further expressed intent in amendatory statutory language was not inadvertent: there was no ambiguity: the resulting language was with the full knowledge and information beforehand: and there remains nothing to interpret as to meaning or intent by the courts as th language is plain. Payment of $30.00 per day is mandated by statute for that period in court and testifying, waiting to testify, and en route to and from court for the purpose of testifying.

CONCLUSION

The petition for a writ of certiorari should be granted to answer the question: Is a material witness who is a convicted felon in physical custody in a state or federal prison -- entitled to the same witness fee allowance as a material witness who is not a convicted felon, but otherwise detained, pursuant to 28 U.S.C. 1821(a)(1) and (b)?

Respectfully submitted

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CERTIFICATE OF SERVICE/MAILING

The Petitioner above, Richard S. Demarest, certifies that pursuant to S.C.R. 28.4(a) a true and correct copy of the above Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530, by deposit of same in the United States Mail Depository at the Arkansas Valley Correction Facility, Crowley, Colorado, postage prepaid, on the 26th day of October, 1989.

Richard S. Demarest

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICHARD DEMAREST,

Petitioner-Appellant,

v.

JAMES MANSPEAKER, Clerk of the United States District Court for the District of Colorado, et al.,

Respondents - Appellees.

No. 88-1899

FILED
United States Court of Appeals
Tenth Circuit
OCT 23 1989
ROBERT L. HOECKER
Clerk

ORDER

Before LOGAN and EBEL, Circuit Judges, and COOK, District Judge.*

*Honorable H. Dale Cook, Chief Judge, United States District Court for the Northern District of Oklahoma, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing in the captioned cause.

Upon consideration whereof, appellant's petition for rehearing is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

PUBLISH

FILED
United States Court of Appeals
Tenth Circuit
SEP 5 - 1989
ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

RICHARD DEMAREST, Petitioner-Appellant, v. JAMES MANSPEAKER, Clerk of United States District Court for the District of Colorado; and CATHY, Last Name Unknown, Defendants-Appellees.	)	No. 88-1899 (C. No. 88-F-843) (D. Colorado)

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RONALD BROOKS TIPPETT, Defendant, EDGAR LEE DURRE, Movant-Appellant.	)	No. 88-1972 (D.C. No. 87-CR-386) (D. Colorado)

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RONALD BROOKS TIPPETT, Defendant, RONALD REESE, Movant-Appellant.	)	No. 88-1973 (D.C. No. 87-CR-386) (D. Colorado)

IN THE MATTER OF GRAND JURY Y-87-1, of the Subpoena of RONALD REECE, Movant-Appellant.	)	No. 88-2782 (D.C. No. 88-Y-114) (D. Colorado)

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RONALD BROOKS TIPPETT, Defendant, ELIZABETH DURRE, Movant-Appellant.	)	No. 88-2327 (D.C. No. 87-CR-386) (D. Colorado)

Submitted on the Briefs:

Richard S. Demarest, Edgar Lee Durre, Ronald L. Reece, and Elizabeth Dufre, pro se.

Michael J. Norton, United States Attorney, and Douglas W. Curless, Assistant United States Attorney, Denver, Colorado, for the United States.

Before LOGAN and EBEL, Circuit Judges, and COOK, District Judge.*

LOGAN, Circuit Judge.

The issue presented in these consolidated appeals is whether appellants, who are incarcerated for criminal offenses, either in federal or state institutions, are entitled to witness fees

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* The Honorable H. Dale Cook, Chief Judge, United States District Court for the Northern District of Oklahoma, sitting by designation.

pursuant to 28 U.S.C. § 1821 for testifying in separate criminal proceedings before a federal court or grand jury. We hold that they are not, and therefore affirm the judgments from which these appeals were taken.[1]

In pertinent part, 28 U.S.C. § 1821 provides as follows:

> "(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.
>
> . . .
>
> (b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.
>
> . . .
>
> (d)(1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.
>
> . . .
>
> (4) When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section."

Appellants contend that the plain language of subsections (a)(1) and (b) mandate the payment of attendance fees to a witness,

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

regardless of whether or not that person is incarcerated. They also point to the qualifying language regarding incarcerated individuals contained in subsection (d)(1) and argue that Congress would have included similar language in subsection (a)(1) or (b) had it intended to preclude prisoners from receiving the fee. On its face, this is an appealing argument.

We note, however, that there is another plausible reading of the statutory language and reason for the reference to incarceration in subsection (d)(1). When Congress referred to incarcerated witnesses in subsection (d)(1) it could have intended to clarify what was impliedly set forth in (d)(4)--that an individual incarcerated under the material witness statute, 18 U.S.C. § 3144 (formerly 18 U.S.C. § 3149), is not to receive a subsistence allowance "in addition to his subsistence." 28 U.S.C. § 1821(d)(4).

Despite the unqualified wording of subsections (a)(1) and (b), strong evidence exists to support the view that Congress never intended § 1821 to apply to individuals incarcerated for criminal acts. Since at least the year 1900, the Teasury Department has taken the position that imprisoned individuals, other than those detained as a material witness, are not entitled to witness fees. In re Witness Fees for Prisoner, 533 F. Supp. 401, 403 & n.5 (E.D. Pa.) (citing 6 Dec. Comp. Treas. 588, 588 (1900)), aff'd per curiam sub nom. In re Grand Jury Matter (Witness RW), 697 F.2d 103, 104 (3d Cir. 1982); Marchese v. United

States, 453 F.2d 1268, 1271 (Ct. Cl. 1972).[2] In 1970 and 1972, despite the existence of similar qualifying language regarding incarcerated individuals contained in the then-existing counterpart to current subsection (d)(1),[3] two different federal appellate courts ruled that § 1821 did not entitle criminal inmates to witness attendance fees. Meadows v. United States Marshal, 434 F.2d 1007 (5th Cir. 1970) (per curiam); Marchese, 453 F.2d at 1271.

Six years after the Marchese decision, in 1978, Congress substantially reorganized § 1821 into its current form. Nowhere in the express language of the revisions or in the legislative history did Congress indicate criminal inmates, other than material witnesses detained for want of security for his appearance, were entitled to a witness fee. Had Congress meant to change the existing judicial and administrative interpretations of § 1821, it surely could have done so in more express terms. Cf. FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 437 (1986) ("When the statute giving rise to the longstanding interpretation has been reenacted without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is

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[2] In addition to their statutory language arguments, plaintiffs rely on Hurtado v. United States, 410 U.S. 578 (1973) (incarcerated material witnesses entitled to attendance fee for number of days detained during trial), to support their position. We agree with the In re Witness Fees court, for the reasons stated therein, that Hurtado is inapposite to the present case. See 533 F. Supp. at 402-03.

[3] The incarceration provision of old § 1821 provided that "[w]itnesses . . . who are not in custody" were entitled to a subsistence allowance. The other pertinent provisions of old § 1821, including the attendance fee provision, are substantially similar to current § 1821, although significantly restructured.

persuasive evidence that the interpretation is the one intended by Congress.'" (quoting NLRB v. Bell Aerospace, 416 U.S. 267, 275 (1974)). Moreover, since the 1978 amendment, other courts have rejected the appellants' interpretation of § 1821, United States v. Garmany, 762 F.2d 929, 933 n.2 (11th Cir. 1985); In re Grand Jury Matter, 697 F.2d at 104, as has the Department of Justice Regulations. See 28 C.F.R. § 21.4(d) (published May 1, 1986) ("A witness in custody for purposes other than 18 U.S.C. 3149 [now § 3144] is ineligible to receive the attendance and subsistence fees provided by this section.").

Other compelling reasons support the view that incarcerated prisoner witnesses should not receive fees for their appearances. First, Congress expressly stated that the 1978 revision of § 1821 was necessary because existing witness fees and allowances "no longer compensate[d] the average witness for the actual costs which witness service entails." H.R. Rep. No. 95-1651, 95th Cong., 2d Sess. 2, reprinted in 1978 U.S. Code Cong. & Ad. News 4631. Beyond their loss of the very modest compensation they might receive from participating in prison job programs, prisoners generally do not incur financial costs serving as a witness. They are transported at the expense of the government, accompanied by government-paid security personnel. Second, if inmates were to receive a $30 fee for every day they attend court to serve as a witness, which is much more than they make working in prison industries, it is not difficult to imagine the potential abuses that might result. There would be greater temptation to file suits and subpoena friends among inmates as witnesses, not only

for the trip they would receive outside the prison, but for the profit from the witness fee.

AFFIRMED.

EBEL, Circuit Judge, dissenting:

In my view, the majority mistakenly has relied upon congressional silence and upon the majority's own policy desires to abrogate the plain language of the statute. It is wrong to use the silence of legislative history to contradict or modify unambiguous text: "[C]ongressional silence, no matter how 'clanging,' cannot override the words of the statute." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.13 (1985). Moreover, although I do not quarrel with the majority's policy concerns, those arguments must be addressed to Congress rather than this court. We have no authority to modify the plain language of a statute based upon what we wished it said: "[N]o matter how unwise or unsatisfactory the . . . [statutory provision], the Constitution provides no license to impose . . . [other terms] we might think fair and just. That task belongs to Congress, not to us." Hurtado v. United States, 410 U.S. 578, 591 (1973). Accordingly, I dissent.

The language of 28 U.S.C. § 1821 is clear and unambiguous. Subsection (a)(1) provides that "a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section." (Emphasis added.) Nothing in the statute states that "a witness" excludes witnesses who happen to be prisoners.

If there were any doubt as to whether "a witness" includes incarcerated witnesses, subsection (d)(1) settles the matter.

That section provides that a witness who is not incarcerated is entitled to receive an additional subsistence allowance when the witness is required to stay overnight:

> A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

28 U.S.C. § 1821(d)(1) (emphasis added).

Subsection (d)(1) necessarily assumes that the phrase "a witness" includes "a witness who is incarcerated" because Congress felt it necessary in subsection (d)(1) expressly to carve out incarcerated witnesses from the phrase "a witness" when Congress did not want to include incarcerated witnesses. Thus the phrase "a witness" contained in subsection (a)(1), which does not carve out incarcerated witnesses, likewise must include "a witness who is incarcerated." No other reading is possible without ignoring the text's plain language or divorcing the statute's subsections from each other.

Further, subsection (e) provides the one and only category of persons who are not entitled to receive witness attendance fees under subsection (a)(1) -- illegal aliens.[1] Thus, Congress plainly knew how to exclude expressly a class of persons from the

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[1] 28 U.S.C. § 1821(e) provides:

> An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 242(b) of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section.

broad category of "witnesses" who are entitled to attendance fees, and Congress did so. But that exclusion did not encompass prisoners (other than, presumably, alien prisoners).

In response, the majority presents four arguments for its view that Section 1821 does not mean what it says.

First, the majority contends that the reference to "a witness who is incarcerated" in subsection (d)(1) might refer only to a witness who is "detained" pursuant to the material witness statute described in subsection (d)(4).[2] The problem with that argument is that subsection (d)(1) says nothing of the sort. Subsection (d)(1) does not mention the material witness statute, but rather refers to all witnesses who are "incarcerated." In contrast, subsection (d)(4) does refer specifically to the material witness statute and uses the narrower phrase "witness [who] is detained" rather than subsection (d)(1)'s broader phrase "witness who is incarcerated." Thus, there is no statutory indication that Congress intended the reference to "a witness who is incarcerated" in subsection (d)(1) to mean only "a witness [who] is detained" pursuant to the material witness statute described in subsection (d)(4). Indeed, the language of the two subsections indicates just the opposite.[3]

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[2] 28 U.S.C. § 1821(d)(4) provides:

> When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

[3] Moreover, the majority's view that subsection (d)(1)'s

[Footnote continued . . .]

Second, the majority relies upon the decisions of three circuit courts and the Court of Claims holding that prisoners are not entitled to witness fees.[4] However, none of those cases contains an analysis of the plain language of the statute or an explanation of why the unambiguous text should not be given effect. The district court's opinion affirmed by the Third Circuit, In re Witness Fees for Prisoner, 533 F. Supp. 401 (E.D. Pa.), aff'd sub nom. In re Grand Jury Matter (Witness RW), 697 F.2d 103 (3d Cir. 1982), at least mentioned the difficulty engendered by the language of subsections (d)(1) and (e). 533 F. Supp at 402. But the district court in that case, although acknowledging that the "legislative history . . . is inconclusive," concluded nonetheless that "Congress did not intend witness fees to be paid to prisoners." Id. The court presented no justification for that conclusion. Moreover, the conclusion contradicts the Supreme Court's later teaching that, "[g]iven the

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[. . . footnote continued]
exclusion of "incarcerated" witnesses refers only to witnesses who are "detained" under subsection (d)(4), produces an illogical result under the literal terms of the statute. Under that view, subsection (d)(1)'s reference to "a witness" would include all prisoners except "detained" prisoners under Section 3149 (now Section 3144), and thus most prisoners would be entitled to subsistence allowances in addition to attendance fees. It makes little sense to give subsistence allowances to ordinary prisoners when their subsistence needs already are being provided at taxpayer expense, and that result seems at odds with the policy benefits sought in the majority opinion.

[4] United States v. Garmany, 762 F.2d 929, 933 n.2 (11th Cir. 1985), cert. denied, 474 U.S. 1062 (1986); In re Grand Jury Matter (Witness RW), 697 F.2d 103, 104 (3d Cir. 1982) (affirming In re Witness Fees for Prisoner, 533 F. Supp. 401, 403 (E.D. Pa. 1982)); Marchese v. United States, 453 F.2d 1268, 1271 (Ct. Cl. 1972); Meadows v. United States Marshal, 434 F.2d 1007, 1008 (5th Cir. 1970), cert. denied, 401 U.S. 1014 (1971).

plain words of the statute," Congress' intent is "best determined by the statutory language that it chooses." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 n.13 (1985).

Third, the majority asserts that Congress must have intended to adopt those other courts' interpretation of the statute because Congress has not substantively changed Section 1821 for many years: "Nowhere in the express language of the revisions [to Section 1821] or in the legislative history did Congress indicate criminal inmates . . . were entitled to a witness fee." (Maj. Op. at 5; emphasis added.) But the majority disregards the fact that the "express language" of the statute already unequivocally entitles witnesses, with no exclusion of "incarcerated" witnesses, to obtain witness attendance fees. It is difficult to fault Congress for failing to revise what already is clear. Again, "congressional silence, no matter how 'clanging,' cannot override the words of the statute." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.13 (1985).[5]

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[5] The majority cites FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 437 (1986), but that case has little to do with this one. In Philadelphia Gear, Congress expressly adopted the FDIC's definition of a key term -- "deposit" -- that was contained in the FDIC's organic statute. Unlike Philadelphia Gear, no administrative determination requiring special deference is involved here, and Congress has not changed Section 1821 to adopt the interpretation of an agency or court. Nor is this case like Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982). In Curran, the Court held that an implied private right of action under the Commodity Exchange Act should be preserved when (1) Congress conducted a comprehensive reexamination and amendment of the Act and left intact the provisions under which numerous federal courts previously had implied a private right of action, and (2) the legislative history of the subsequent amendments indicated that Congress intended to preserve the private remedy. 456 U.S. at 381-82, 384-88. Here, unlike the situation in Curran, the prior interpretation of the
[Footnote continued . . .]

Fourth, the majority suggests that there are policy reasons militating against giving witness attendance fees to prisoners. The majority's concerns center on the fact that current attendance fees are higher than inmates' prison salaries, and consequently there is the potential for abuse. I do not dispute the legitimacy of those concerns, although I believe that district courts have the means -- such as taking testimony by telephone or through depositions, or by imposing appropriate sanctions on abusive parties -- to minimize the problem. But even if I were to agree that the statute as written is misguided, that is no reason to overturn it by judicial fiat. The task of divining good policy "belongs to Congress, not to us." Hurtado v. United States, 410 U.S. 578, 591 (1973).[6]

In conclusion, this is not an instance in which a statute produces an "unfathomable" result and "can't mean what it says." Green v. Bock Laundry Machine Co., ___ U.S. ___, 109 S. Ct. 1981, 1895, 104 L. Ed. 2d 557, 565 (1989). Section 1821 is neither

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[. . . footnote continued]
statute by other federal courts flatly contradicts the statute's plain language (as opposed to extending it), and there is no legislative history indicating that Congress intended to adopt those courts' interpretation.

[6] It would be interesting to know whether there are any other categories of witnesses, besides prisoners, whom the majority would bar from receiving statutorily mandated fees and allowances. Can convicted criminals sentenced to government-supported "half-way houses" receive them? Convicted criminals sentenced to probation? Parolees? Residents of government-supported mental institutions? Government employees? Minor children? The point is that the majority nowhere explains why prisoners are to be excluded from the statute when other persons in potentially analogous situations are not. The inherent difficulty in making distinctions among categories of witnesses, especially in the face of an unambiguous, unrestricted statute, is itself a reason why the creation of those distinctions should be left to Congress.

internally inconsistent nor facially ambiguous. Under a plain reading of the statute, prisoners serving as witnesses are entitled to attendance fees but not to subsistence allowances. That result is neither illogical nor irrational. There is no legislative history showing conclusively that the statute does not mean what it says. Consequently, I would reverse the district court's judgments in these consolidated appeals and would hold that prisoners, like other witnesses, are entitled to witness attendance fees under Section 1821.

ORIGINAL

No. 89-5916

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RICHARD S. DEMAREST, PETITIONER

v.

JAMES MANSPEAKER, ET AL

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a state prisoner who serves as a witness in federal court proceedings is entitled to a witness fee under 28 U.S.C. 1821.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-5916

RICHARD S. DEMAREST, PETITIONER

v.

JAMES MANSPEAKER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES
IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1b-14b) is reported at 884 F.2d 1343.1/

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1989. A petition for rehearing was denied on October 23, 1989. The petition for a writ of certiorari was filed on October 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

1/ In the appendix to the petition, the dissent in the court of appeals is separately numbered. For convenience, we will cite the dissent as "Pet. App. 8b-14b."

STATEMENT

Petitioner is a prisoner at the Arkansas Valley Correctional Facility of the Colorado Department of Corrections in Crowley, Colorado. After testifying in a federal criminal trial in the United States District Court for the District of Colorado, he unsuccessfully petitioned the clerk of that court for assistance in obtaining payment of witness fees. On petition for review of that decision, the district court denied relief. Pet. App. 1a-2a. The court of appeals affirmed. Pet. App. 1b-14b.

1. On March 3, 1988, petitioner was transferred by federal marshals pursuant to a writ of habeas corpus ad testificandum from the Arkansas Valley Correctional Facility to the Denver County Jail where he was held in readiness to testify in United States v. Ronald Brooks Tippett, No. 87-CR-386 (D. Colo.). The trial began on March 7, 1988 and ended on March 18, 1988. Petitioner testified on March 15, 1988. He was held in the Denver County Jail until April 5, 1988, when he was returned to the Arkansas Valley Correctional Facility. Pet. Complaint 2.

Petitioner requested that the district court clerk prepare a certification pursuant to 28 U.S.C. 1825(a)(2) and forward it to the United States Marshal for the District of Colorado for payment of witness fees pursuant to 28 U.S.C. 182_(a)(1) and (b). Pet. 3-4. When no certification was prepared, petitioner sought relief in the district court by filing a "Petition for Review of Acts and Omissions of Clerks of the District Court or, in the Alternative, Complaint for Relief in

the Nature of Mandamus." Pet. Complaint 1-7.

The district court denied the petition and dismissed the alternative complaint. Pet. App. 1a-2a. Relying on United States v. Garmany, 762 F.2d 929, 933 n.2 (11th Cir. 1985), cert. denied, 474 U.S. 1062 (1986); In re Grand Jury Matter (Witness RW), 697 F.2d 103, 104 (3d Cir. 1982); and Meadows v. United States Marshal, 434 F.2d 1007, 1008 (5th Cir. 1970), cert. denied, 401 U.S. 1014 (1971), the court held that "[i]nmate witnesses are not entitled to receive witness fees." Pet. App. 1a.

2. With one judge dissenting, the court of appeals affirmed. Petitioner had argued that the plain language of 28 U.S.C. 1821(a)(1) and (b) mandated the payment of witness fees for attendance to all witnesses, whether incarcerated or not, and that the absence of qualifying language related to prisoners, such as that included in Section 1821(d)(1) for subsistence fees, showed that Congress did not intend to preclude prisoners from receiving attendance fees. The court conceded that the argument was "appealing." Pet. App. 4b.[2/] It noted, however, that the

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2/ In pertinent part, 28 U.S.C. 1821 provides:

> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.
>
> * * * * *
>
> (b) A witness shall be paid an attendance fee of $30

(continued...)

qualifying language in subsection (d)(1) could plausibly be interpreted to coordinate with the special provision for material witnesses in subsection d(4)[3/], rather than to imply that prisoners are to receive attendance fees. Pet. App. 4b.

The court further found "strong evidence" that Congress never intended Section 1821 to apply to convicted prisoners. Ibid. The court pointed out that since 1900, the Treasury Department has taken the position that convicted prisoners are not entitled to witness fees; that in 1970 and 1972 two different

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2/ (...continued)
per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

* * * * *

(d)(1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

* * * * *

(4) When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

Former Section 3149 of title 18, now 18 U.S.C. 3144, is the federal material witness statute.

3/ That is, to make clear that material witnesses who are detained because of inability to post a security bond--the witnesses referred to in subsection (d)(4)--are to receive only the subsistence allowance provided for in subsection (d)(4).

federal appellate courts held to the same effect;[4/] that in its 1978 revision of the witness fee statute Congress showed no intention and took no steps to change these existing judicial and administrative interpretations of the statute; that two additional courts of appeals have since rejected petitioner's interpretation of the statute;[5/] and that Department of Justice regulations published in 1986 (28 C.F.R. 21.4(d)) declare that witnesses who are convicted prisoners are not eligible to receive witness fees. Pet. App. 4b-6b.

The court identified two other factors supporting the view that convicted prisoners are ineligible to receive witness fees. First, the legislative history of the 1978 revision of Section 1821 showed a Congressional intent that witness fees "compensate the average witness for the actual costs which witness service entails." H.R. Rep. No. 1651, 95th Cong., 2d Sess. 2 (1978). Other than the loss of "the very modest compensation they might receive from participating in prison job programs," the court reasoned, convicted prisoners did not incur financial costs from witness service.[6/] Second, the court foresaw a potential for abuse in circumstances that would encourage prisoners to file

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4/ The decisions in question were Marchese v. United States, 453 F.2d 1268, 1271 (Ct. Cl. 1972), and Meadows v. United States Marshal, supra.

5/ United States v. Garmany, supra; In re Grand Jury Matter (Witness RW), supra.

6/ Petitioner earns $40 a month working as a clerk at the Arkansas Valley Correctional Facility. See Pet. Affidavit in Support of Motion for Leave to Proceed in Forma Pauperis 1.

suit and subpoena inmate friends as witnesses in order to provide them both with trips outside the prison and a $30 daily witness fee far exceeding the compensation available in prison job programs. Pet. App. 6b-7b.

Judge Ebel dissented. Although he did not quarrel with the policy concerns expressed by the majority, he found that the language of 28 U.S.C. 1821 was "clear and unambiguous," and that although Congress evidently knew how to create an exclusion in the statute, it had not done so for convicted prisoners. Pet. App. 8b-10b. He disputed the majority's analysis of subsections (d)(1) and (4), arguing that the decisions relied on by the majority had not analyzed the plain language of the statute, that Congressional acquiescence in those decisions should not be read into Congress's failure to revise an already clear Section 1821, and that it was the responsibility of Congress, not the courts, to address the policy concerns noted by the majority. Pet. App. 10b-14b.

ARGUMENT

Petitioner contends (Pet. 5-15) that a convicted state prisoner who serves as a witness in federal court proceedings is entitled to the payment of witness fees pursuant to 28 U.S.C. 1821(a)(1) and (b). The contention is without merit. The decision of the court of appeals was correct, and is supported by the clear Congressional purpose behind the fees, the relevant case law, and long-standing administrative practice.

1. In pertinent part, 28 U.S.C. 1821(a)(1) and (b) state that "a witness in attendance at any court of the United States * * * shall be paid the fees and allowances provided by this section," including "an attendance fee of $30 per day for each day's attendance." As the Senate Committee on the Judiciary explained when fees and allowances for witnesses were increased in 1949, the purpose of providing for such fees and allowances was to provide fair compensation for "time and expenses incident to * * * service as a witness." See S. Rep. No. 187, 81st Cong., 1st Sess. 1 (1949). The House Judiciary Committee made a similar comment on a predecessor statute, c. 183, Sections 1-3, 44 Stat. 323-324, in H.R. Rep. No. 308, 69th Cong., 1st Sess. 2-3 (1926): "This bill does not provide compensation nor give a bounty for jury service or service as witnesses, but merely provides fees that will approximately take care of necessary expenses." In 1978 Congress reiterated that the consistent purpose of this statute has been to "compensate the average witness for * * * actual costs." H.R. Rep. No. 1651, 95th Cong., 2d Sess. 2 (1978).

As a convicted state prisoner, petitioner is not an average witness, since his time is not at his disposal, and he does not cover his own living expenses. Petitioner, a state prisoner who was temporarily in federal custody pursuant to a writ of habeas corpus ad testificandum incurred no expenses for transportation or subsistence. Although he may have missed an opportunity to earn part of his $40 monthly compensation in his prison job,

Congress could not have intended to permit petitioner, in such circumstances, to obtain a windfall of $30 per day. Moreover, as the court of appeals correctly noted, the availability of such a windfall to convicted prisoners would invite large-scale abuse of the witness fee system.

2. The decision of the court below is likewise supported by every reported decision in which a court has considered the issue raised by petitioner. See United States v. Garmany, supra; In re Grand Jury Matter (Witness RW), supra; Marchese v. United States, supra; Meadows v. United States Marshal, supra. In Meadows, for example, the court held that Section 1821 does not authorize payment of witness fees to federal prisoners in the custody of the Attorney General since "they are not in a position similar to ordinary witnesses who must incur private costs in order to testify" (434 F.2d at 1008). That analysis is equally applicable here, and petitioner's argument must therefore be rejected.

3. The conclusion of the court of appeals is also consistent with long-established administrative practice. In an early opinion, the Comptroller of the Treasury held that a convicted federal prisoner was not entitled to witness fees or allowances because his "time and services belonged to the Government, which is charged with his care and support." In addition, a prisoner was not entitled to mileage, since "[t]he Government necessarily bears the expenses of his transportation." The Comptroller did rule that a fee must be paid

to a prisoner who is merely awaiting trial since "his time has not been forfeited to the Government." 6 Comp. Dec. 588 (1900).

The Comptroller General thereafter rejected demands for compensation from state prisoners, similar to petitioner's claim here, on the principle that the statutory provision for fees to witnesses "is not intended to compensate them for testifying, but simply to pay their expenses while away from home" (18 Comp. Gen. 609, 610 (1939)), and that witnesses who are in custody, whether federal or state, are "not subjected to any expense by reason of their attendance." 18 Comp. Gen. 765, 766 (1939). And, as the court of appeals noted, the Justice Department as recently as 1986 reiterated its understanding that "[a] witness in custody for purposes other than [the material witness statute] is ineligible to receive the attendance and subsistence fees provided by this section" (28 C.F.R. 21.4(d)).7/

4. The case upon which petitioner primarily relies, Hurtado v. United States, 410 U.S. 578 (1973), does not require a different result. The witnesses in that case were incarcerated

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7/ The short answer to the extensive statutory arguments made by petitioner and the court below is that for 90 years no court or administrative agency that has considered the witness fee statute has interpreted it to provide fees for convicted prisoners, and for the same 90 years, during multiple revisions of the statute, Congress has never seen fit to disagree with this uniform judicial and administrative interpretation. As the court below observed in FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 437 (1986), "[w]hen the statute giving rise to the longstanding interpretation has been reenacted without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress'" (quoting NLRB v. Bell Aerospace, 416 U.S. 267, 275 (1974)).

only because they were witnesses.[8/] Underlying the holding in Hurtado was the Court's perception that a person detained as a material witness "is in the same position as a non-incarcerated witness." 410 U.S. at 587. A material witness-detainee is prevented from conducting his affairs as an ordinary citizen solely because he cannot afford bail to secure his attendance as a witness; were it not for his status as a witness, he would not be incarcerated. Petitioner's incarceration, however, stems from another cause entirely: he has been convicted of a crime. Thus he is not "in the same position as a non-incarcerated witness." See Marchese v. United States, 453 F.2d at 1271; Meadows v. United States Marshal, 434 F.2d at 1008; In re Witness Fees for Prisoner, 533 F. Supp. 401, 402-403 & n.5 (E.D. Pa.), aff'd, 697 F.2d 103 (3d Cir. 1982).

Furthermore, as the court noted in In re Witness Fees for Prisoner, 533 F. Supp. at 403 & n.6, Congress read Hurtado as requiring witness fees for material witnesses detained pursuant to a statute, not for any other category of detainee-witnesses. See H.R. Rep. No. 1651, 95th Cong., 2d Sess. 5 (1978); accord, S. Rep. No. 756, 95th Cong., 2d Sess. 3-4 (1978). Congress therefore increased the witness fee, and excluded illegal aliens from receiving any fees, in order to "provide more reasonable compensation for the inconvenience and financial hardships which detention entails." Ibid. Accordingly, because service as a

---

8/ They were detained as material witnesses under former Fed. R. Crim. P. 46(b), which was superseded by 18 U.S.C. 3149, now 18 U.S.C. 3144.

witness by a convicted prisoner does not entail such inconvenience or hardship, it is clear that Congress did not intend that witness fees be paid to convicted prisoners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
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EDWARD S.G. DENNIS, JR.
Assistant Attorney General

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Attorney

MARCH 1990

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RECEIVED
MAR 29 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

RICHARD S. DEMAREST, PETITIONER

vs. No. 89-5916

JAMES MANSPEAKER, ET AL.

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE UNITED STATES IN OPPOSITION by mail on March 29, 1990.

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March 29, 1990

Kenneth W. Starr
KENNETH W. STARR
SOLICITOR GENERAL

DOJ

Form OSG-7
APR 1978

Supreme Court, U.S.
FILED
JUN 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-5916

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD S. DEMAREST

Petitioner,

v.

JAMES A. MANSPEAKER, et al.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 28, 1989
PETITION FOR CERTIORARI GRANTED APRIL 23, 1990

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RELEVANT DOCKET ENTRIES

June 1, 1988	Petition for Review of Acts and Omissions of Clerks of the District Court filed.
June 1, 1988	Order of District Court denying petition.
June 8, 1988	Notice of appeal filed.
September 5, 1989	Opinion and Judgment of United States Court of Appeals for the Tenth Circuit
October 23, 1989	Order denying rehearing

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 88-843

RICHARD S. DEMAREST,
Plaintiff-Petitioner, pro se,

v.

JAMES R. MANSPEAKER, Clerk of the United States District Court for the District of Colorado; CATHY [LAST NAME UNKNOWN]—whose true name is unknown, Deputy Clerk of the United States District Court for the District of Colorado and assigned to the Honorable Jim Carrigan between March 7, 1988 and March 18, 1988, in their individual and official capacities,
Defendants-Respondents.

PETITION FOR REVIEW OF ACTS AND OMISSIONS OF CLERKS OF THE DISTRICT COURT OR, IN THE ALTERNATIVE, COMPLAINT FOR RELIEF IN THE NATURE OF MANDAMUS

COMES NOW the above Plaintiff-Petitioner, pro se, and respectfully requests this Honorable Court to grant him relief by review of acts and omissions of the Defendant-Respondent clerks of the District Court for the District of Colorado or, in the alternative, relief in the nature of mandamus, and for grounds therefore, Plaintiff-Petitioner states as follows:

JURISDICTION

The Court has jurisdiction in this action pursuant to 28 U.S.C. § 1361 to compel a clerk of a federal district court, an employee of the United States, to perform a statutory

duty owed the Plaintiff-Petitioner. Jurisdiction is also invoked pursuant to 28 U.S.C. § 1651.

VENUE

Venue is proper on the action pursuant to 28 U.S.C. § 1391(3) where the action is brought against an officer or employee of the United States acting in his official capacity, where the defendant resides, or where the cause of action arose.

STATEMENT OF FACTS

On Thursday, March 3, 1988, Plaintiff-Petitioner, on a writ of Habeas Corpus Ad Testificandum issued by the Honorable Jim Carrigan, Federal District Judge, was transported by the United States Marshal from the Arkansas Valley Correction Facility in Crowley, Colorado to the Denver County Jail in Denver, Colorado to be held in readiness to provide testimony in the scheduled criminal trial of *United States* v. *Ronald Brooks Tippett*. This trial commenced March 7, 1988 and concluded March 18, 1988. Plaintiff-Petitioner was continuously confined in the Denver County Jail until April 5, 1988, at which time he was returned to the Arkansas Valley Correction Facility. Plaintiff-Petitioner testified on the case in open court on March 15, 1988.

Plaintiff-Petitioner wrote Defendant MANSPEAKER on April 16, 1988 to inquire on the status of his claim for payment of witness fees pursuant to 28 U.S.C. § 1821(a)(1) and (b) (1978). Instead of replying, Defendant MANSPEAKER tendered Plaintiff-Petitioner's letter to the United States Attorney, Douglas W. Curless, Denver, Colorado. While 28 U.S.C. § 1821(a)(1) and (b) (1978) make no provision, Mr. Curless nevertheless responded to Plaintiff-Petitioner's inquiry with a statement that

there was no entitlement to witness fees. Plaintiff-Petitioner responded to Mr. Curless with supporting authority and a request that Mr. Curless respond. Mr. Curless has not responded.

On May 2, 1988, Plaintiff-Petitioner again wrote Defendant MANSPEAKER to inquire about the identity of the deputy clerk assigned to the Honorable Jim Carrigan during the period of Mr. Tippett's criminal trial. Defendant MANSPEAKER responded on May 16, 1988, but did not provide the name of the deputy clerk. Plaintiff-Petitioner has not been able to determine the true name of the deputy clerk other than having the first name of CATHY.

FOUNDATION OF ARGUMENT

Plaintiff-Petitioner avers he is entitled to witness fee compensation pursuant to 28 U.S.C. § 1821(a)(1) and (b) (1978). *Hurtado* v. *United States*, 410 U.S. 578, 93 S.Ct. 1157, 35 L.Ed.2d 508 (1973).

Plaintiff-Petitioner spent two days occupied in going to and returning from the court in Denver and he was continuously confined in the Denver County Jail on March 7, 8, 9, 10, 14, 15, 16 and 17, 1988, the days of Mr. Tippett's trial. Pursuant to 28 U.S.C. § 1821(a)(1) and (b) (1978), Plaintiff-Petitioner asserted he was entitled to ten days of statutory compensation.

Pursuant to 28 U.S.C. § 1825(a) and (2), the defendants have a statutory duty to perform the ministerial duty of certifying to the United States Marshal an affidavit respecting Plaintiff-Petitioner's court attendance. As Mr. Tippett was represented by court-assigned private counsel, § 2 of ¶ a was triggered, placing the ministerial

responsibility on the defendant clerks only and to the exclusion of the United States Attorney.

ARGUMENT FOR IN-HOUSE REVIEW OF CLERKS' ACTS AND OMISSIONS

The ministerial functions assigned to the clerk of a district court by 28 U.S.C. § 1825(a) and (2) (1986) are not discretionary.

Plaintiff-Petitioner contends that he attempted to resolve the issue of the defendant clerks' failure to adhere to 28 U.S.C. § 1825(a) and (2) (1986) by written communication to Defendant MANSPEAKER and that there lie no further remedial actions without court intervention.

As an extraordinary remedy, mandamus generally will not issue unless there is a clear right in the plaintiff to the relief sought, a plainly defined and nondiscretionary duty on the part of the defendant to honor that right, and no other adequate remedy, either judicial or administrative, available. *See Heckler* v. *Ringer*, 466 U.S. 602, 614, 104 S.Ct. 2013, 2021, 80 L.Ed.2d 622 (1984); *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980); *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U.S. 540, 543-44, 57 S.Ct. 855, 857, 81 L.Ed. 1272 (1937).

Action in mandamus may be premature here where there is a fully adequate alternative remedy such as a petition to the court seeking review of the defendant's conduct. Plaintiff-Petitioner concedes that there is no statute or rule expressly authorizing a court to conduct such a review. It is nevertheless reasoned that the district court's power over its clerks is inherent in the nature of the relationship between the two where "it is the right and duty of the court . . . to correct the irregularities of

its officer and compel him to perform his duty." *See Griffin* v. *Thompson*, 2 How. 244, 257, 43 U.S. 244, 11 L.Ed. 253 (1844).

In relevant part, 28 U.S.C. § 1825(a) and (2) (1986) states:

> (a) In any case which the United States or an officer or agency of the United States is a party, the United States marshal for the district shall pay all fees of witnesses
>
> . . .
>
> (2) *on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to 3006A of title 18, in a criminal case in which a defendant is represented by other such counsel.* (emphasis added).

The duty of certification is for the clerk/deputy clerk of the court and not that of the United States Attorney. When Plaintiff-Petitioner communicated with Defendant MANSPEAKER and he submitted the issue to the United States Attorney without certifying in accordance with statute, Defendant MANSPEAKER exceeded the jurisdiction of the statute and breached the official capacity of the office of the clerk of the district court.

WHEREFORE, in the absence of statute or rule, Plaintiff-Petitioner seeks the "in-house" review by the Court of the acts and omissions of the Defendants respecting the mandate of statute.

ALTERNATIVE REMEDY ARGUMENT RELIEF IN THE NATURE OF MANDAMUS

In the absence of statute or rule providing for informal "in-house" review of the acts and omissions of the Defendants, and there being no other judicial or administrative

remedy available, Plaintiff-Petitioner seeks relief in the nature of mandamus.

Interpretation Of The Statute

The first task is to determine whether Congress had an intent with respect to the relevant issue. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9, 104 S.Ct 2778, 2781-82 n.9, 81 L.Ed.2d 694 (1984). *See also Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 126, 105 S.Ct. 1102, 1108, 84 L.Ed.2d 90 (1985). In the instant case, 28 U.S.C. § 1825(a) and (2) are subject to such interpretation.

Propriety Of Mandamus

It is well established that mandamus is proper where "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to the plaintiff." *Council of and for the Blind of Delaware County Valley* v. *Regan*, 709 F.2d 1521, 1533 (D.C. Cir. 1983) (en banc).

This Court has recognized that 28 U.S.C. § 1361 confers jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States to perform a duty owed to the Plaintiff. *Birdwell* v. *Schlesinger*, 403 F.Supp. 710, 718 (D.C. Colo. 1975). The Tenth Circuit interpreted that the duty to be compelled must be ministerial, plainly prescribed and free from doubt. *Prairie Band of Pottawatomie Tribe of Indians* v. *Udall*, 355 F.2d 364 (10th Cir. 1966), *cert. denied*, 385

U.S. 831, 87 S.Ct. 70, 17 L.Ed.2d 67 (1966). *See also United States ex rel. McLennan* v. *Wilbur*, 283 U.S. 414, 420, 51 S.Ct. 502, 504, 75 L.Ed. 1148 (1931). This burden is met in 28 U.S.C. § 1825(a) and (2) (1986).

Plainly, there being no suitable statute or rule available or other means [beyond the informal "in-house" review suggested *ante*] to attain the relief desired, *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26, 63 S.Ct. 938, 941, 87 L.Ed. 1185 (1943), and 28 U.S.C. § 1825(a) and (2) (1986) satisfying Plaintiff-Petitioner's "burden of showing that [his] right to issuance of the writ is 'clear and indisputable'", *Banker's Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 384, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953), quoting *United States ex rel. Bernardin* v. *Duell*, 172 U.S. 576, 582, 19 S.Ct. 286, 287, 43 L.Ed. 559 (1899), Plaintiff-Petitioner is entitled to relief in the nature of mandamus as provided in 28 U.S.C. § 1361 to compel the Defendants' compliance with the statute.

CONCLUSION

The Defendants are statutorily mandated to provide certification by affidavit to the United States Marshal accounting for the days occupied in transportation to and from a court in which testimony is to be taken and for such time during which the witness is in a state of readiness to testify whether he waits in a witness room or jail. *Hurtado* v. *United States*, 410 U.S. 578, 585-85, 93 S.Ct. 1157, 1162, 35 L.Ed.2d 508 (1973).

WHEREFORE, Plaintiff-Petitioner first seeking a summary "in-house" review of the acts and omissions of the Defendants as a condition precedent to judicial mandate through mandamus—such "in-house" review constituting the last available administrative review procedure available to Plaintiff-Petitioner—and such

review not attaining the result of compliance by Defendants under 28 U.S.C. § 1825(a) and (2) (1986); there being no suitable alternative remedy; and the harm irreparable, alternative relief in the nature of mandamus compelling the Defendants to issue appropriate certification affidavits to the United States Marshal is prayed for, or for the issuance of the Defendants of an order directing them to show cause why the intent of the Congress should not be complied with by them.

Dated: May 25, 1988

Respectfully submitted,

/s/RICHARD S. DEMAREST

RICHARD S. DEMAREST
Plaintiff-Petitioner, pro se
Register 48201
Box 1000 Unit 1-C
Crowley, CO 81034

VERIFICATION

[omit in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. 89-1899
Civil Action No. 88-843

RICHARD S. DEMEREST,
Plaintiff,

v.

JAMES R. MANSPEAKER, Clerk of the United States District Court for the District of Colorado, *et al.*,
Defendants.

Filed June 10, 1988

ORDER

Sherman G. Finesilver, Chief Judge

This matter comes before the court on plaintiff's Petition for Review of Acts and Omissions of Clerks of the District Court or, in the Alternative, Complaint for Relief in the Nature of Mandamus. Plaintiff is incarcerated in the Arkansas Valley Correctional Facility, Crowley, Colorado. On March 3, 1988, he was transported by the United States Marshal to Denver to testify in a federal criminal trial. Plaintiff was transported pursuant to a writ of habeas corpus ad testificandum. Plaintiff alleges he was denied witness fees for his testimony at trial.

Inmate witnesses are not entitled to receive witness fees. *United States* v. *Garmany*, 762 F.2d 929, 933 n.2 (11th Cir. 1985); *In re Grand Jury Matter (Witness RW)*, 697 F.2d 103, 104 (3d Cir. 1982); *Meadows* v. *United States*

Marshal, 434 F.2d 1007, 1008 (5th Cir. 1970), *cert. denied*, 401 U.S. 1014 (1971).

ACCORDINGLY, plaintiff's Motion to Proceed In Forma Pauperis is GRANTED. The petition is DENIED and the complaint is DISMISSED.

DATED this 1st day of June, 1988, at Denver, Colorado.

BY THE COURT:
/s/SHERMAN G. FINESILVER
SHERMAN G. FINESILVER, Chief Judge
United States District Court

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 88-1899
(D.C. No. 88-F-843)
(D. Colorado)
RICHARD S. DEMEREST,
Petitioner-Appellant,
v.
JAMES MANSPEAKER, Clerk of the United States District Court for the District of Colorado; and CATHY, Last Name Unknown,
Defendants-Appellees.

No. 88-1972
(D.C. No. 87-CR-386)
(D. Colorado)
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RONALD BROOKS TIPPETT,
Defendant,
EDGAR LEE DURRE,
Movant-Appellant.

No. 88-1973
(D.C. No. 87-CR-386)
(D. Colorado)
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RONALD BROOKS TIPPETT,
Defendant,
RONALD REESE,
Movant-Appellant.

No. 88-2782
(D.C. No. 88-Y-114)
(D. Colorado)
IN THE MATTER OF GRAND JURY Y-87-1,
OF THE SUPPOENA OF RONALD REECE,
Movant-Appellant.

No. 88-2327
(D.C. No. 87-CR-386)
(D. Colorado)
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
RONALD BROOKS TIPPETT,
Defendant,
ELIZABETH DURRE,
Movant-Appellant.

Filed September 5, 1989

Before LOGAN and EBEL, Circuit Judges, and COOK, District Judge.*

LOGAN, Circuit Judge.

The issue presented in these consolidated appeals is whether appellants, who are incarcerated for criminal offenses, either in federal or state institutions, are entitled to witness fees pursuant to 28 U.S.C. § 1821 for testifying in separate criminal proceedings before a federal court or grand jury. We hold that they are not, and

*The Honorable H. Dale Cook, Chief Judge, United States District Court for the Northern District of Oklahoma, sitting by designation.

therefore affirm the judgments from which these appeals were taken.[1]

In pertinent part, 28 U.S.C. § 1821 provides as follows:

> "(a)(1) Except as otherwise as provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.
>
> . . .
>
> (b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.
>
> . . .
>
> (d)(1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.
>
> . . .
>
> (4) When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day of deten-

[1] After examining the briefs and appellate record, this penal has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

tion when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section."

Appellants contend that the plain language of subsections (a)(1) and (b) mandate the payment of attendance fees to a witness, regardless of whether or not that person is incarcerated. They also point to the qualifying language regarding incarcerated individuals contained in subsection (d)(1) and argue that Congress would have included similar language in subsection (a)(1) or (b) had it intended to preclude prisoners from receiving the fee. On its face, this is an appealing argument.

We note, however, that there is another plausible reading of the statutory language and reason for the reference to incarceration in subsection (d)(1). When Congress referred to incarcerated witnesses in subsection (d)(1) it could have intended to clarify what was impliedly set forth in (d)(4)—that an individual incarcerated under the material witness statute, 18 U.S.C. § 3144 (formerly 18 U.S.C. § 3149), is not to receive a subsistence *allowance* "in addition to his subsistence." 28 U.S.C. § 1821(d)(4).

Despite the unqualified wording of subsections (a)(1) and (b), strong evidence exists to support the view that Congress never intended § 1821 to apply to individuals incarcerated for criminal acts. Since at least the year 1900, the Treasury Department has taken the position that imprisoned individuals, other than those detained as a material witness, are not entitled to witness fees. *In re Witness Fees for Prisoner*, 533 F. Supp. 401, 403 & n.5 (E.D. Pa.) (citing 6 Dec. Comp. Treas. 588, 588 (1900)), *aff'd per curiam sub nom. In re Grand Jury Matter (Witness RW)*, 697 F.2d 103, 104 (3d Cir. 1982); *Marchese*

v. *United States*, 453 F.2d 1268, 1271 (Ct. Cl. 1972).[2] In 1970 and 1972, despite the existence of similar qualifying language regarding incarcerated individuals contained in the then-existing counterpart to current subsection (d)(1),[3] two different federal appellate courts ruled that § 1821 did not entitle criminal inmates to witness attendance fees. *Meadows* v. *United States Marshal*, 434 F.2d 1007 (5th Cir. 1970) (per curiam); *Marchese*, 453 F.2d at 1271.

Six years after the *Marchese* decision, in 1978, Congress substantially reorganized § 1821 into its current form. Nowhere in the express language of the revisions or in the legislative history did Congress indicate criminal inmates, other than material witnesses detained for want of security for his appearance, were entitled to a witness fee. Had Congress meant to change the existing judicial and administrative interpretations of § 1821, it surely could have done so in more express terms. *Cf. FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986) ("When the statute giving rise to the longstanding interpretation has been reenacted without pertinent change, the 'congressional failure to revise or repeal the agency's

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[2] In addition to their statutory language arguments, plaintiffs rely on *Hurtado* v. *United States*, 410 U.S. 578 (1973) (incarcerated material witnesses entitled to attendance fee for number of days detained during trial), to support their position. We agree with the *In re Witness Fees* court, for the reasons stated therein, that *Hurtado* is inapposite to the present case. *See* 533 F. Supp. at 402-03.

[3] The incarceration provision of old § 1821 provided that "[w]itnesses . . . who are not in custody" were entitled to a subsistence allowance. The other pertinent provisions of old § 1821, including the attendance fee provision, are substantially similar to current § 1821, although significantly restructured.

interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" (quoting *NLRB* v. *Bell Aerospace*, 416 U.S. 267, 275 (1974)). Moreover, since the 1978 amendment, other courts have rejected the appellants' interpretation of § 1821, *United States* v. *Garmany*, 762 F.2d 929, 933 n.2 (11th Cir. 1985); *In re Grand Jury Matter*, 697 F.2d at 104, as has the Department of Justice Regulations. *See* 28 C.F.R. § 21.4(d) (published May 1, 1986) ("A witness in custody for purposes other than 18 U.S.C. 3149 [now § 3144] is ineligible to receive the attendance and subsistence fees provided by this section.").

Other compelling reasons support the view that incarcerated prisoner witnesses should not receive fees for their appearances. First, Congress expressly stated that the 1978 revision of § 1821 was necessary because existing witness fees and allowances "no longer compensate[d] the average witness for the actual costs which witness service entails." H.R. Rep. No. 95-1651, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4631. Beyond their loss of the very modest compensation they might receive from participating in prison job programs, prisoners generally do not incur financial costs serving as a witness. They are transported at the expense of the government, accompanied by government-paid security personnel. Second, if inmates were to receive a $30 fee for every day they attend court to serve as a witness, which is much more than they make working in prison industries, it is not difficult to imagine the potential abuses that might result. There would be greater temptation to file suits and subpoena friends among inmates as witnesses, not only for the trip they would receive outside the prison, but for the profit from the witness fee.

AFFIRMED.

Nos. 88-1899, 88-1972, 88-1973, 88-2782, 88-2327—*Demarest* v. *Manspeaker*.

EBEL, Circuit Judge, dissenting:

In my view, the majority mistakenly has relied upon congressional silence and upon the majority's own policy desires to abrogate the plain language of the statute. It is wrong to use the silence of legislative history to contradict or modify unambiguous text: "[C]ongressional silence, no matter how 'clanging,' cannot override the words of the statute." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496 n.13 (1985). Moreover, although I do not quarrel with the majority's policy concerns, those arguments must be addressed to Congress rather than this court. We have no authority to modify the plain language of a statute based upon what we wished it said: "[N]o matter how unwise or unsatisfactory the . . . [statutory provision], the Constitution provides no license to impose . . . [other terms] we might think fair and just. That task belongs to Congress. not to us." *Hurtado* v. *United States*, 410 U.S. 578, 591 (1973). Accordingly, I dissent.

The language of 28 U.S.C. § 1821 is clear and unambiguous. Subsection (a)(1) provides that "*a witness* in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section." (Emphasis added.) Nothing in the statute states that "a witness" excludes witnesses who happen to be prisoners.

If there were any doubt as to whether "a witness" includes incarcerated witnesses, subsection (d)(1) settles the matter. That section provides that a witness *who is not incarcerated* is entitled to receive an additional subsistence allowance when the witness is required to stay overnight:

> A subsistence allowance shall be paid to *a witness (other than a witness who is incarcerated)* when an overnight stay is required at the place of attendance

> because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

28 U.S.C. § 1821(d)(1) (emphasis added).

Subsection (d)(1) necessarily assumes that the phrase "a witness" includes "a witness who is incarcerated" because Congress felt it necessary in subsection (d)(1) expressly to carve out incarcerated witnesses from the phrase "a witness" when Congress did not want to include incarcerated witnesses. Thus the phrase "a witness" contained in subsection (a)(1), which does not carve out incarcerated witnesses, likewise must include "a witness who is incarcerated." No other reading is possible without ignoring the text's plain language or divorcing the statute's subsections from each other.

Further, subsection (e) provides the one and only category of persons who are not entitled to receive witness attendance fees under subsection (a)(1)—illegal aliens.[1] Thus, Congress plainly knew how to exclude expressly a class of persons from the broad category of "witnesses" who are entitled to attendance fees, and Congress did so. But that exclusion did *not* encompass prisoners (other than, presumably, alien prisoners).

In response, the majority presents four arguments for its view that Section 1821 does not mean what it says.

---

[1] 28 U.S.C. § 1821(e) provides:

> An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 242(b) of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section.

First, the majority contends that the reference to "a witness who is incarcerated" in subsection (d)(1) might refer only to a witness who is "detained" pursuant to the material witness statute described in subsection (d)(4).[2] The problem with that argument is that subsection (d)(1) says nothing of the sort. Subsection (d)(1) does not mention the material witness statute, but rather refers to all witnesses who are "incarcerated." In contrast, subsection (d)(4) does refer specifically to the material witness statute and uses the narrower phrase "witness [who] is *detained*" rather than subsection (d)(1)'s broader phrase "witness who is *incarcerated*." Thus, there is no statutory indication that Congress intended the reference to "a witness who is incarcerated" in subsection (d)(1) to mean only "a witness [who] is detained" pursuant to the material witness statute described in subsection (d)(4). Indeed, the language of the two subsections indicates just the opposite.[3]

---

[2] 28 U.S.C. § 1821(d)(4) provides:

> When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

[3] Moreover, the majority's view that subsection (d)(1)'s exclusion of "incarcerated" witnesses refers only to witnesses who are "detained" under subsection (d)(4), produces an illogical result under the literal terms of the statute. Under that view, subsection (d)(1)'s reference to "a witness" would *include* all prisoners except "detained" prisoners under Section 3149 (now Section 3144), and thus most prisoners would be entitled to *subsistence* allowances in addition to attendance fees. It makes little sense to give subsistence allowances to ordinary prisoners when their subsistence needs already are being provided at taxpayer expense, and that result seems at odds with the policy benefits sought in the majority opinion.

Second, the majority relies upon the decisions of three circuit courts and the Court of Claims holding that prisoners are not entitled to witness fees.[4] However, none of those cases contains an analysis of the plain language of the statute or an explanation of why the unambiguous text should not be given effect. The district court's opinion affirmed by the Third Circuit, *In re Witness Fees for Prisoner*, 533 F. Supp. 401 (E.D. Pa.), *aff'd sub nom. In re Grand Jury Matter (Witness RW)*, 697 F.2d 103 (3d Cir. 1982), at least mentioned the difficulty engendered by the language of subsections (d)(1) and (e). 533 F. Supp at 402. But the district court in that case, although acknowledging that the "legislative history . . . is inconclusive," concluded nonetheless that "Congress did not intend witness fees to be paid to prisoners." *Id.* The court presented no justification for that conclusion. Moreover, the conclusion contradicts the Supreme Court's later teaching that, "[g]iven the plain words of the statute," Congress' intent is "best determined by the statutory language that it chooses." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 495 n.13 (1985).

Third, the majority asserts that Congress must have intended to adopt those other courts' interpretation of the statute because Congress has not substantively changed Section 1821 for many years: "Nowhere in the *express language* of the revisions [to Section 1821] or in the legislative history did Congress indicate criminal inmates . . .

[4] *United States* v. *Garmany*, 762 F.2d 929, 933 n.2 (11th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986); *In re Grand Jury Matter (Witness RW)*, 697 F.2d 103, 104 (3d Cir. 1982) (affirming *In re Witness Fees for Prisoner*, 533 F. Supp. 401, 403 (E.D. Pa. 1982)); *Marchese* v. *United States*, 453 F.2d 1268, 1271 (Ct. Cl. 1972); *Meadows* v. *United States Marshal*, 434 F.2d 1007, 1008 (5th Cir. 1970), *cert. denied*, 401 U.S. 1014 (1971).

were entitled to a witness fee." (Maj. Op. at 5; emphasis added.) But the majority disregards the fact that the "express language" of the statute already unequivocally entitles witnesses, with no exclusion of "incarcerated" witnesses, to obtain witness attendance fees. It is difficult to fault Congress for failing to revise what already is clear. Again, "congressional silence, no matter how 'clanging,' cannot override the words of the statute." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496 n.13 (1985).[5]

Fourth, the majority suggests that there are policy reasons militating against giving witness attendance fees to prisoners. The majority's concerns center on the fact that current attendance fees are higher than inmates' prison salaries, and consequently there is the potential for abuse. I do not dispute the legitimacy of those concerns, although I believe that district courts have the means—

[5] The majority cites *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986), but that case has little to do with this one. In *Philadelphia Gear*, Congress expressly adopted the FDIC's definition of a key term—"deposit"—that was contained in the FDIC's organic statute. Unlike *Philadelphia Gear*, no administrative determination requiring special deference is involved here, and Congress has not changed Section 1821 to adopt the interpretation of an agency or court. Nor is this case like *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353 (1982). In *Curran*, the Court held that an implied private right of action under the Commodity Exchange Act should be preserved when (1) Congress conducted a comprehensive reexamination and amendment of the Act and left intact the provisions under which numerous federal courts previously had implied a private right to action, and (2) the legislative history of the subsequent amendments indicated that Congress intended to preserve the private remedy. 456 U.S. at 381-82, 384-88. Here, unlike the situation in *Curran*, the prior interpretation of the statute by other federal courts flatly contradicts the statute's plain language (as opposed to extending it), and there is no legislative history indicating that Congress intended to adopt those courts' interpretation.

such as taking testimony by telephone or through depositions, or by imposing appropriate sanctions on abusive parties—to minimize the problem. But even if I were to agree that the statute as written is misguided, that is no reason to overturn it by judicial fiat. The task of divining good policy "belongs to Congress, not to us." *Hurtado* v. *United States*, 410 U.S. 578, 591 (1973).[6]

In conclusion, this is not an instance in which a statute produces an "unfathomable" result and "can't mean what it says." *Green* v. *Bock Laundry Machine Co.*, ___ U.S. ___, 109 S. Ct. 1981, 1895, 104 L. Ed. 2d 557, 565 (1989). Section 1821 is neither internally inconsistent nor facially ambiguous. Under a plain reading of the statute, prisoners serving as witnesses are entitled to attendance fees but not to subsistence allowances. That result is neither illogical nor irrational. There is no legislative history showing conclusively that the statute does not mean what it says. Consequently, I would reverse the district court's judgments in these consolidated appeals and would hold that prisoners, like other witnesses, are entitled to witness attendance fees under Section 1821.

---

[6] It would be interesting to know whether there are any other categories of witnesses, besides prisoners, whom the majority would bar from receiving statutorily mandated fees and allowances. Can convicted criminals sentenced to government-supported "halfway houses" receive them? Convicted criminals sentenced to probation? Parolees? Residents of government-supported mental institutions? Government employees? Minor children? The point is that the majority nowhere explains why prisoners are to be excluded from the statute when other persons in potentially analogous situations are not. The inherent difficulty in making distinctions among categories of witnesses, especially in the face of an unambiguous, unrestricted statute, is itself a reason why the creation of those distinctions should be left to Congress.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 88-1899
D.C. # 88-F-843

RICHARD S. DEMEREST,
Plaintiff-Appellant,

v.

JAMES MANSPEAKER, Clerk of the United States District Court for the District of Colorado; and CATHY, Last Name Unknown,
Defendants-Appellees.

JUDGMENT
Entered September 5, 1989

Before LOGAN and EBEL, Circuit Judges, and COOK, District Judge.*

---

*The Honorable H. Dale Cook, Chief Judge, United States District Court for the Northern District of Oklahoma, sitting by designation.

This cause came to be heard on the record on appeal from the United States District Court for the District of Colorado, and was submitted on the briefs at the direction of the court.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court
ROBERT L. HOECKER, Clerk
/s/Patrick Fisher
BY: Patrick Fisher
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 88-1899

RICHARD DEMEREST,
Petitioner-Appellant,

v.

JAMES MANSPEAKER, Clerk of the United States District Court for the District of Colorado; *et al.*,
Respondents-Appellees.

ORDER

Before LOGAN and EBEL, Circuit Judges, and COOK, District Judge.*

*Honorable H. Dale Cook, Chief Judge, United States District Court for the Northern District of Oklahoma, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing in the captioned cause.

Upon consideration whereof, appellant's petition for rehearing is denied.

Filed October 23, 1989

ENTERED FOR THE COURT
/S/ROBERT L. HOECKER
ROBERT L. HOECKER, CLERK

SUPREME COURT OF THE UNITED STATES

No. 88-5916

RICHARD DEMEREST,
Petitioner,

v.

JAMES MANSPEAKER, *et al.*,

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 23, 1990

Supreme Court, U.S.
FILED
JUL 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-5916

In The

Supreme Court of the United States

October Term, 1990

RICHARD S. DEMAREST,

Petitioner,

v.

JAMES A. MANSPEAKER, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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QUESTION PRESENTED

Is a convicted state prisoner, when summoned to appear as a witness in federal court, entitled to a witness fee pursuant to 28 U.S.C. § 1821(a)(1) and (b) for each day he is in attendance at court to provide testimony?

PARTIES

In addition to Petitioner Richard S. Demarest and Respondent James A. Manspeaker, Clerk of the United States District Court for the District of Colorado, the proceeding below included one Cathy, last name unknown, named as a defendant in Petitioner's original pleading in the district court, in her capacity as deputy clerk of the district court assigned to the criminal case from which this dispute arose.

The United States Court of Appeals for the Tenth Circuit consolidated several appeals filed by inmate witnesses from the underlying criminal action. Additional parties to the consolidated appeals were: Edgar Lee Durre, No. 88-1972; Ronald Reese, Nos. 88-1973 and 88-2782; and Elizabeth Durre, No. 88-2327. The United States was a party to each of the consolidated appeals.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 884 F.2d 1343 (10th Cir. 1989), and reprinted in the Joint Appendix at p. 11. The unreported order of the United States District Court for the District of Colorado is reprinted in the Joint Appendix at p. 9.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1989. A timely petition for rehearing was denied on October 23, 1989. Petitioner filed his petition for a writ of certiorari on October 28, 1989. The petition was granted on April 23, 1990. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

A. 28 U.S.C. § 1821(a)(1), (b), (d)(1), (d)(4), (e) (1988)

> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.
>
> * * *
>
> (b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the

beginning and end of such attendance or at any time during such attendance.

* * *

(d)(1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

* * *

(4) When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

(e) An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 242(b) of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section.

B. 28 U.S.C. § 1825(a), (b) (1988)

(a) In any case in which the United States or an officer or agency of the United States is a party, the United States marshal for the district shall pay all fees of witnesses on the certificate of the United States attorney or assistant United States attorney, and in the proceedings before a United States magistrate, on the certificate of such magistrate, except that any fees of defense witnesses, other than experts, appearing pursuant to subpoenas issued upon approval of the

court, shall be paid by the United States marshal for the district –

(1) on the certificate of a Federal public defender or assistant Federal public defender, in a criminal case in which the defendant is represented by such Federal public defender or assistant Federal public defender, and

(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in a criminal case in which a defendant is represented by such other counsel.

(b) In proceedings in forma pauperis for a writ of habeas corpus, and in proceedings in forma pauperis under section 2255 of this title, the United States marshal for the district shall pay, on the certificate of the district judge, all fees of witnesses for the party authorized to proceed in forma pauperis, except that any fees of witnesses for such party, other than experts, appearing pursuant to subpoenas issued upon approval of the court, shall be paid by the United States marshal for the district –

(1) on the certificate of a Federal public defender or assistant Federal public defender, in any such proceedings in which a party is represented by such Federal public defender or assistant Federal public defender, and

(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in any such proceedings in which a party is represented by such other counsel.

C. Act of April 26, 1926, c. 183, §§ 1, 3, 44 Stat. 323, *as amended by* Act of June 30, 1932, c. 314, § 323(b), 47 Stat. 413; Act of March 22, 1935, c. 39, § 3, 49 Stat. 105

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurors and witnesses (other than witnesses who are salaried employees of the Government, and detained witnesses) in the United States courts, including the District Court of Hawaii, the District Court of Porto [sic] Rico, and the Supreme Court of the District of Columbia, who attend, including those attending before United States commissioners, shall be entitled to a per diem for each day of actual attendance and for each day necessarily occupied in traveling to attend court, or upon the commissioner, and return home, and, in addition, mileage as hereinafter provided.
>
> Sec. 3. Witnesses attending in such courts, or before such commissioners, shall receive for each day's attendance and for the time necessarily occupied in going to and returning from the same, $2, and 5 cents per mile for going from his or her place of residence to the place of trial or hearing and 5 cents per mile for returning, Provided, That witnesses (other than witnesses who are salaried employees of the Government and detained witnesses) in the United States courts, including the District Court of Hawaii, the District Court of Puerto Rico, and the District Court of the United States for the District of Columbia, who attend court or attend before United States commissioners, at points so far removed from their respective residences as to prohibit return thereto from day to day, shall be entitled, in addition to the compensation provided by existing law, as modified by this Act, to a per diem of $3 for expenses of subsistence for each day of actual attendance and for each day necessarily occupied in traveling to attend court and return home. In cases in which the United States is a party, witnesses on behalf of the United States shall be entitled to the payments provided by this section upon the certificate of the United States attorney, or assistant United States attorney, or United States commissioner.

D. Act of June 25, 1948, c. 646, § 1821, 62 Stat. 950

> A witness attending in any court of the United States or before a United States commissioner or person taking his deposition pursuant to any order of a court of the United States, shall receive $2 for each day's attendance and for the time necessarily occupied in going to and returning from the same, and 5 cents per mile for going from and returning to his place of residence. Witnesses who are not salaried employees of the Government and who are not in custody and who attend at points so far removed from their respective residences as to prohibit return thereto from day to day shall be entitled to an additional allowance of $3 per day for expenses of subsistence.

E. 28 C.F.R. § 21.4(d) (1989)

> (d)(4) A witness (other than an alien covered by § 21.3) detained in custody pursuant to 18 U.S.C. 3149 for want of security for his or her appearance shall receive subsistence in kind and shall be paid a single daily attendance fee for each day the witness is detained. A witness in custody for purposes other than 18 U.S.C. 3149 is ineligible to receive the attendance and subsistence fees provided by this section.

STATEMENT OF THE CASE

In March of 1988, Petitioner Richard Demarest was an inmate in the Arkansas Valley Correctional Facility at Crowley, Colorado, where he was serving a sentence imposed by state law. On March 3, 1988, Mr. Demarest was transported by a United States Marshal to the Denver, Colorado County Jail pursuant to a writ of habeas corpus ad testificandum issued by Judge Jim R. Carrigan, United States District Court for the District of Colorado. Mr. Demarest was summoned to appear as a witness in the district court on the application of the defendant in federal criminal proceedings styled *United States v. Ronald Brooks Tippett*, No. 87-CR-386. Joint Appendix, p. 2.

Mr. Demarest was held in custody at the Denver County Jail from March 3 until April 5, 1988. Trial of the *Tippett* case commenced on March 7 and was concluded on March 18, 1988. Mr. Demarest testified in open court on March 15, 1988. After his testimony, Mr. Demarest requested that the deputy clerk of the district court certify his entitlement to witness fees pursuant to 28 U.S.C. section 1825(a). Mr. Demarest requested fees for 10 days: two days on which he was in transit between the Arkansas Valley Correctional Facility and the Denver County Jail, and eight days during which he was held in Denver County Jail while proceedings took place in the *Tippett* case. Joint Appendix, p. 3. The deputy clerk failed to issue the requested certification. Joint Appendix, p. 2.

On April 16, 1988 Mr. Demarest wrote to the clerk of the district court, James Manspeaker, again requesting certification for witness fees, and citing 28 U.S.C. section

1821. Mr. Manspeaker apparently referred the request to the Assistant U.S. Attorney who represented the United States in the *Tippett* case, a Mr. Curless. Mr. Curless responded by letter to Mr. Demarest denying his request for certification on the ground that prisoners are not entitled to receive witness fees. A further letter from Mr. Demarest to Clerk Manspeaker, dated May 2, 1988, also failed to produce the requested certification. Joint Appendix, pp. 2-3.

On May 25, 1988 Mr. Demarest filed and served in the district court a Petition for Review of Acts and Omissions of Clerks of the District Court or, in the Alternative, Complaint for Relief in the Nature of Mandamus (hereinafter the "Petition and Complaint"). The clerk and deputy clerk of the district court were named as defendants and served. In the Petition and Complaint, Mr. Demarest recited the foregoing facts and asked the district court to order the clerk to certify his request for fees. Joint Appendix, pp. 1-8. So far as the record reveals, the defendants filed no response to the Petition and Complaint and no hearing was held by the district court.

On June 1, 1988 the district court entered its order denying the Petition and dismissing the Complaint on the sole ground that 28 U.S.C. section 1821 does not authorize the payment of witness fees to convicted prisoners. Joint Appendix, pp. 9-10. Mr. Demarest filed a timely notice of appeal from the district court's order, and filed and served his brief thereafter. The record indicates no responsive papers filed by the appellees.

The United States Court of Appeals for the Tenth Circuit ordered the case submitted without oral argument

and the panel issued its opinion on September 5, 1989. By a two-to-one majority, the district court's order was affirmed. Judge Ebel filed a written dissent. Joint Appendix, pp. 11-22. After his petition for rehearing was denied, Joint Appendix, p. 24, Mr. Demarest filed his petition for certiorari with this Court, which was granted on April 23, 1990.

SUMMARY OF THE ARGUMENT

This case presents a straightforward issue of law which nevertheless raises important questions concerning statutory construction and relations between the judicial and legislative branches of government. A federal statute unequivocally states that "a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section." 28 U.S.C. § 1821(a)(1). With equal clarity, the following subsection provides: "A witness shall be paid an attendance fee of $30 per day for each day's attendance." *Id.* § 1821(b). Petitioner Demarest, it is undisputed, was summoned to appear in the United States District Court for the District of Colorado and gave testimony as a witness. Yet he was denied the attendance fee to which he is plainly entitled under the statute.

The majority below justified this result by reading into the statute an exception nowhere expressed or implied in the language chosen by Congress. It ignored the clear and unambiguous language of the statute and held that Congress intended to except from the phrase "a

witness" any person incarcerated for the commission of a crime.

Three related provisions of the statute confirm that the words "a witness" in subsections (a) and (b) must be given their ordinary meaning. Subsection (d)(1), which excludes "incarcerated witnesses" from entitlement to an additional subsistence allowance, shows unmistakably that the phrase "a witness" in subsections (a)(1) and (b) *includes* incarcerated witnesses such as Mr. Demarest. Subsection (d)(4), which entitles "detained" witnesses – those confined for want of security for their appearance – to an additional benefit, shows that Congress distinguished between "detained" and "incarcerated" witnesses in the language and scheme of the statute, and made separate provisions for each. Subsection (e), which excludes certain alien witnesses, demonstrates that Congress considered who should be excluded from witness fees and allowances and knew how to accomplish that purpose expressly.

Read in context, these related provisions demonstrate a rational and deliberate approach by Congress discriminating between incarcerated, detained, and other witnesses in a manner appropriate to their different circumstances. The court below ignored the careful construction of the statutory scheme except to suggest that it was "plausible" that Congress meant the same thing by the terms "incarcerated" in (d)(1) and "detained pursuant to section 3149 of title 18" in (d)(4) – an interpretation inconsistent with the language and design of the statute.

The legislative history provides no basis for ignoring the statute's plain language. It does not speak to the issue

presented here. In its general statements of purpose or intent, the legislative history, fairly read, confirms that payment of witness fees to inmates is consistent with the underlying purpose of the witness fee provision. Certainly nothing in the legislative history so clearly suggests the contrary as to justify the lower court's refusal to apply the statute as written.

Less recent federal judicial opinions interpreting the statute are devoid of analysis. They merely defer, as did the majority here, to administrative practices by the Comptroller and the Department of Justice. But neither of these agencies has been charged by Congress with any special responsibility for interpreting the witness statute and neither has any special expertise that would make deference to its opinions appropriate. There is no evidence that Congress ever adopted or ratified any such interpretation. More fundamentally, judicial and administrative interpretations contrary to the clear and unambiguous language of the statute should not be permitted to stand.

Apparently, the majority below was convinced that paying witness fees to prisoners is a poor federal policy. Prisoners have meager incomes anyway, and attendance fees might encourage indigent criminal defendants to subpoena their incarcerated friends. There is nothing in the record to confirm such fears, but, even were there, it is for Congress, not the courts, to weigh countervailing policy considerations. Petitioner suggests that the proper course is to enforce the law as written, leaving to Congress the task of rewriting the statute if it chooses to do so.

ARGUMENT

I. INTRODUCTION

Interpretation of a statute must begin with its language, not merely the particular words in dispute but the language of the statute as a whole. *Mallard v. United States Dist. Court*, 109 S. Ct. 1814, 1818 (1989); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

The relevant language from 28 U.S.C. section 1821 reads as follows:

> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.
>
> * * *
>
> (b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.
>
> * * *
>
> (d)(1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.
>
> * * *
>
> (4) When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day

of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

(e) An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 242(b) of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section.

The scheme of these related provisions is straightforward. Subsection (a)(1) defines the general class entitled to benefits under section 1821. Subsection (b) provides for a mandatory witness fee of $30 per day for each day's "attendance." Subsection (d)(1) provides for a subsistence allowance, in addition to the witness fee, under certain circumstances, but expressly excludes from this benefit witnesses who are "incarcerated." Subsection (d)(4) is a special provision bestowing additional benefits on a carefully defined subset of incarcerated witnesses: those "detained pursuant to section 3149 of title 18." Such witnesses are entitled, in addition to the $30 per day witness fee for each day's attendance provided by subsection (b), to a similar payment for each additional day of detention when not "in attendance" at court. Subsection (e) expressly and specifically excludes certain classes of alien witnesses from any of the benefits conferred by section 1821.

A study of these provisions, Petitioner suggests, leads plainly to the conclusion that he was a witness

entitled to an attendance fee. The majority below, however, chose to ignore the clarity of the statutory scheme. Purporting to find a "plausible" alternative reading of the statute based upon subsection (d)(4), the court shifted its focus from the statute itself to its legislative history and administrative and judicial readings of it. Ultimately, the majority's judgment seems to rest upon deference to administrative practice and its own policy concerns.

Petitioner submits that the majority erred. The language of the statute is plain. Its provisions, read as a whole, make sense. There was no warrant to go beyond them. In any event, the legislative history is unilluminating; judicial precedents are scarce and rely uncritically upon administrative practice. Though admittedly long-standing, that administrative practice is not based upon a persuasive reading of Congress' language but instead upon a conviction that prisoners do not need and should not receive witness attendance fees. Whatever the wisdom of Congress' judgment, administrative practice should not be permitted to nullify it.

II. THE COURT BELOW ERRED IN LOOKING BEYOND THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE STATUTE

A. The Language of Section 1821(a)(1) and (b) Is Clear and Unambiguous

Section 1821(a)(1) entitles "a witness in attendance" at federal court to the benefits generally authorized by the section. The mandatory nature of the entitlement is underscored by the use of the phrase "shall be paid" which follows. No one disputes that Petitioner was a

witness in attendance at the underlying federal court proceeding from which this dispute arose.

The same unqualified, all-inclusive language is used in section 1821(b), which mandates payment of the daily attendance fee which is the basis of Petitioner's claim: "A witness shall be paid an attendance fee of $30 per day for each day's attendance." The court below acknowledged "the unqualified wording of subsections (a)(1) and (b)," Joint Appendix, p. 14, but failed to accept the consequences of that fact. "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " *United States v. Ron Pair Enterprises*, 109 S. Ct. 1026, 1030 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

In short, the operative language of the statute "could not be clearer. . . . It is impossible further to explain the statute without merely repeating its language. . . . The language is clear and leads to no other interpretation." *Commissioner v. Asphalt Products Co.*, 482 U.S. 117, 120 (1987). *See also Hallstrom v. Tillamook County*, 110 S. Ct. 304, 309 (1989). "The task of resolving the dispute over the meaning of [the statute] begins where all such inquiries must begin: with the language of the statute itself. . . . In this case it is also where the inquiry should end." *Ron Pair Enterprises*, 109 S. Ct. at 1030.

B. Related Provisions of Section 1821 Confirm the Plain Meaning of "A Witness"

Reference to subsections (d)(1), (d)(4), and (e) of section 1821 conclusively confirms that the phrase "a witness" means any witness, including those who are

incarcerated. Each of these subsections clearly and independently implies that imprisoned witnesses are included in the general class defined by subsection (a)(1).

1. Subsection (d)(1)

Subsection (d)(1) is a parallel provision to subsection (b). Each provides a separate, specific benefit to the class of persons identified in (a)(1). Subsection (d)(1) provides:

> A subsistence allowance shall be paid to *a witness (other than a witness who is incarcerated)* when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day. [Emphasis added.]

Congress' use of the emphasized words removes any doubt that an incarcerated witness is "a witness" within the meaning of subsection (a)(1). If it were not so, there would have been no need to except such witnesses from the subsistence allowance provision, because incarcerated witnesses would not then be entitled to *any* benefits under section 1821. Moreover, the use of unqualified language in 1821(b), followed closely by qualified language in the parallel provisions of 1821(d)(1), strongly suggests that Congress intended the former to have broad application. *United States v. Dangdee*, 616 F.2d 1118, 1119-20 (9th Cir. 1980).

There is no reason to believe that the distinction drawn here by Congress – providing witness fees to incarcerated witnesses, but denying an attendance allowance – is not deliberate and rational. Incarcerated

witnesses, unlike others, do not have expenses for lodging and meals. On the other hand, Congress could logically reward incarcerated witnesses just as it does others for performing the public duty and service of providing testimony. *See* Section III.C. *infra*. The distinction evidenced in these two subsections clearly implies that Congress was aware of the different circumstances of incarcerated and other witnesses and expressly provided for differential treatment in cases considered appropriate. "Congress limited *other* provisions of the [statute] . . . , which indicates that its failure to do so in [a particular subsection] was not inadvertent." *Citicorp Industrial Credit, Inc. v. Brock*, 483 U.S. 27, 34 (1987) (emphasis in original). *See Crandon v. United States*, 110 S. Ct. 997, 1004 (1990) (use of language specifically reaching "preemployment" situations in two similar provisions indicates Congress did not intend to reach such situations in a third provision containing no such language).

It should also be apparent that Congress selected its language with some care. The word "incarcerated" means "imprison[ed]; confine[d] in a jail or penitentiary." Black's Law Dictionary 685 (5th ed. 1979). It refers to persons confined by the state for any reason: awaiting trial, detained as a witness, or serving a sentence. By clear implication, incarcerated witnesses – including convicted prisoners – are included in the category defined by subsection (a)(1) and entitled to the witness fee provided by subsection (b). Any other reading does violence to the statutory language and scheme devised by Congress. As Judge Ebel observed in his dissenting opinion, "If there

were any doubt as to whether 'a witness' includes incarcerated witnesses, subsection d(1) settles the matter." Joint Appendix, p. 17.

2. Subsection (d)(4)

Subsection (d)(4) authorizes a special benefit for a particular subset of incarcerated witnesses: those detained for want of security for their appearance pursuant to a particular federal statute. Although excluded from the subsistence allowance provided by (d)(1) because of their incarcerated status, such prisoners are entitled to the general witness fee in subsection (b).

Presumably it is undisputed that at least this category of incarcerated witnesses is included in the benefits available under subsections (a)(1) and (b). *See Hurtado v. United States*, 410 U.S. 578 (1973).[1] Subsection (d)(4)

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[1] *Hurtado* is this Court's only interpretation of the witness fee statute. A group of aliens, detained in this country to provide testimony on behalf of the government against those who assisted their illegal entry into this country, sought to obtain the basic $20 witness fee, provided by section 1821(b)'s precursor, for each day's confinement. The administrative practice at the time was to pay such witnesses that fee only for those days when the witness actually testified in court, and to pay $1 per day for the balance of the witness' confinement under a former provision somewhat akin to subsection (d)(4). The Court determined that such witnesses were entitled to the basic witness fee of $20 per day for each day "in attendance" – confined to secure testimony while the trial was in session – and $1 per day for the remainder of confinement. Although it did not address directly the issue raised here, the *Hurtado* opinion is important to this case for three reasons. First, it

(Continued on following page)

serves only to ensure that detained witnesses, in addition to such payments, are similarly compensated for days of detention on which, for one reason or another, they are not actually "in attendance" at the trial to which they are summoned. Again, this distinction between the subclass of "detained" witnesses and the larger class of "incarcerated" witnesses is reasonably related to the different circumstances of the two groups. "Detained" witnesses, confined solely to secure their testimony, are entitled to be paid for each day of incarceration. Prisoners, on the other hand, are entitled to fees only when "in attendance" at court since they are incarcerated already for independent reasons.

The current language of subsection (d)(4), as amended in 1978, was enacted in response to the *Hurtado* dissent's contention that the previous version of the statute worked a hardship on detained, incarcerated witnesses by providing them only $1 per day when detained but not "in attendance" at trial. *See Hurtado*, 410 U.S. at 591-600 (Brennan, J., concurring in part and dissenting in part). *See also* H.R. Rep. No. 95-1651, 95th Cong., 2d Session 5 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad.

(Continued from previous page)

defined the meaning of "in attendance" and prescribed the period for which witnesses "in custody" were entitled to the basic witness fee. Second, it confirmed the plain meaning of "a witness": "The statute provides $20 per diem compensation to a witness who is in necessary attendance on a court, but *that fee is payable to any witness, incarcerated or not.*" 410 U.S. at 590 (emphasis added). Third, it demonstrated that agency interpretations of the witness fee statute are not entitled to deference where they conflict with the meaning of the statute.

News 4631, 4634; Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, House of Representatives, 95th Cong., 2d Sess. 91 (1978).

The suggestion of the majority below that the purpose of subsection (d)(1) is simply to make explicit what subsection (d)(4) "implies" – that detained witnesses are not entitled to a subsistence allowance in addition to attendance fees – defies the statutory language, common sense, and the legislative history of section 1821. The clear purpose of subsection (d)(4) is to provide, out of fairness, benefits different from those granted in subsections (b) and (d)(1). Subsection (d)(1) uses a different and more inclusive term, "incarcerated," to describe those witnesses excluded from entitlement to a subsistence allowance – a term consistent with the rationale for exclusion. Subsection (d)(4), on the other hand, uses precise terms to describe the special sub-category of incarcerated witnesses who are eligible for an additional benefit because of their peculiar circumstances. Where Congress chooses different terms in two closely related subsections of a statute, courts must assume that choice to be deliberate and give effect to each according to its terms. *See Mallard*, 109 S. Ct. at 1818 (use of precatory language in one subsection followed by mandatory language in the next is "perhaps the clearest proof" that former was not intended to be compulsory).

Moreover, had Congress intended merely to "clarify" subsection (d)(4), it could certainly have done so more efficiently and clearly by amending subsection (d)(4) itself. Congress did in fact amend subsection (d)(4) in 1978.[2] If

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[2] Act of October 13, 1978, Pub. L. No. 95-535, 92 Stat. 2033.

its intention was to "clarify" (d)(4), it had merely to add a sentence at the end such as: "Such witnesses, however, shall not be entitled to the subsistence allowance provided by subsection (d)(1) of this section while detained." Even more simply, of course, Congress could have referred specifically to subsection (d)(4) in the parenthetical phrase in (d)(1), thus: "(except detained witnesses as defined in subsection (d)(4) of this section)." The fact that (d)(1) and (d)(4) appear as separate subsections, and use different operative terms, strongly implies that they have different purposes and were intended to affect different categories of witnesses, and contradicts the view that the first merely clarifies the second.

3. Subsection (e)

Perhaps the most compelling evidence from the statutory scheme that subsections (a)(1) and (b) mean precisely what they say is found in subsection (e), which was added to the statute by amendment in 1978. Subsection (e) specifically and unequivocally excludes certain classes of alien witnesses from *any* of the benefits of section 1821. Subsection (e) conclusively demonstrates that Congress focused in 1978 on the question of excepting certain classes of witnesses, and identified those it chose to exclude from the phrase "a witness" in subsection (a)(1). It goes without saying that Congress could have added other classes of witnesses to subsection (e) if it intended others to be excluded. As Judge Ebel observed in dissent, "subsection (e) provides the one and only category of persons who are not entitled to receive witness attendance fees. . . . Congress plainly knew how to exclude

expressly a class of persons from the broad category of 'witnesses' . . . and Congress did so." Joint Appendix, p. 18. *See Citicorp*, 483 U.S. at 34 (fact that Congress identified only two narrow categories of "innocent" persons exempted from the statute "suggests that all other persons, innocent or not, *are* subject to the statute").

The majority opinion below did not even address the implication of subsection (e) when it engrafted its own further exception onto section 1821. In fact, the opinion below ignored the statutory scheme completely except to suggest that there is "another plausible reading" of the relationship between subsections (d)(1) and (d)(4) to that expressed by the ordinary meaning of the words. Joint Appendix, p. 14. In evading the plain language of the statute and the clear implications of the statutory scheme, the court below violated this Court's most fundamental principles of statutory construction, and its decision must therefore be reversed. "Unless exceptional circumstances dictate otherwise, '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete.' " *Burlington N. R.R. v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).[3] A court "cannot justify disregard of what Congress has plainly and intentionally provided." *Asphalt Products Co.*, 482 U.S. at 121. The court below was "not at liberty to create an exception where Congress has declined to do so." *Hallstrom*, 110 S. Ct. at 309.

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[3] As the balance of this brief demonstrates, there are no "exceptional circumstances" in this case which could justify the result below.

III. THE LEGISLATIVE HISTORY OF SECTION 1821 IS INCONCLUSIVE AND CANNOT SUPPORT THE GOVERNMENT'S CONSTRUCTION OF THE STATUTE

Based on a single excerpt from the legislative history of section 1821, the majority below suggested that "compelling reasons support the view that incarcerated prisoner witnesses *should* not receive fees for their appearances." Joint Appendix, p. 16 (emphasis added). The only language cited for this proposition is the following quotation from a House committee report: "[Witness fees and allowances] 'no longer compensate the average witness for the actual costs which witness service entails.' " Joint Appendix, p. 16 (quoting H.R. Rep. No. 95-1651, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4631, 4631). Because prisoner witnesses do not normally incur such costs "beyond their loss of the very modest compensation they might receive from participating in prison job programs," the court reasoned, they are not "average witnesses" and are not entitled to fees. *Id.*[4]

The majority's reliance on this vague and isolated statement of legislative purpose is misplaced for several reasons. *First*, it was improper for the court below to resort to legislative history to vary the unambiguous language of the statute. *Hallstrom v. Tillamook County*, 110

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[4] There is, of course, no evidence in the record to suggest how much income, if any, Petitioner Demarest was required to forego due to his summons to testify, or whether any such income derived from compensation from prison work, from handicrafts, or from other sources.

S. Ct. 304, 310 (1989). *Second*, even if the legislative history were a proper indicator of congressional intent in this case, a full review of that history reveals that it is "inconclusive and irrelevant" on the issue of convicted prisoners' entitlement to witness fees. *Burlington N. R.R. v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987). As best Petitioner Demarest can determine, not once in the 200-year history of witness fee legislation has Congress or its committees or members expressed a view on the subject beyond the language of the statute itself. *Third*, the legislative history contains other general statements of purpose which are perfectly consistent with payment of fees to inmate witnesses, and the court below misread the "average witness" language in the excerpt it chose. *See Hallstrom*, 110 S. Ct. at 310.

In short, the legislative history of the witness fee statute is, as this Court noted on a previous occasion, "unenlightening." *Hurtado*, 410 U.S. at 586 n.7. In such circumstances, Petitioner suggests, the only reliable indicator of Congress' intent is the language it has chosen to include in the statute. *Burlington N. R.R.*, 481 U.S. at 461; *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). "[T]his is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood v. United States*, 350 U.S. 366, 374 (1956) (Frankfurter, J.).

A. The Legislative History Need Not be Consulted Where the Language of the Statute is Plain

When the Court determines that the language of a statute is clear and unambiguous, its legislative history

typically is not consulted to vary the ordinary meaning of that language. *E.g., Mead Corporation v. Tilley,* 109 S. Ct. 2156 (1989); *Public Employees Retirement System v. Betts,* 109 S. Ct. 2854 (1989); *Rodriguez v. United States,* 480 U.S. 522 (1987); *Burlington N. R.R. v. Oklahoma Tax Commission,* 481 U.S. 454 (1987); *Rubin v. United States,* 449 U.S. 424 (1981); *Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978). Exceptions are limited to those rare cases where "exceptional circumstances dictate otherwise." *Burlington N. R.R.,* 481 U.S. at 461. Such "exceptional circumstances" may include "a clearly expressed legislative intention to the contrary," *id.,* or where a literal application of the statutory language produces an absurd result. *Green v. Bock Laundry Machine Co.,* 109 S. Ct. 1981, 1985 (1989). Here, as the following discussion indicates, there is *no* clearly expressed congressional intention in the legislative history with respect to inmate witnesses. Moreover, there is nothing absurd about paying such witnesses the modest fee provided by section 1821(b). Indeed, such payments would further the congressional purposes identified in the legislative history.

B. The Legislative History Is Silent on the Entitlement of Inmates to Witness Fees

The first federal statute providing for witness fees was enacted in 1792.[5] The statute has been amended 11

[5] Act of May 8, 1792, c. 36, § 3, 1 Stat. 277: "To witnesses summoned in any of the courts of the United States the same compensation in each state respectively as are allowed in the supreme courts of the same."

times since.[6] In none of the available hearings, debates, or committee reports of which Petitioner is aware is there any specific statement of the intentions of Congress with respect to convicted inmates who are summoned as witnesses. The legislative record is simply silent on this point. *See Citicorp Industrial Credit Inc. v. Brock,* 483 U.S. 27, 34-35 (1987) (refusing to add secured creditors to categories exempted from provision of FLSA prohibiting shipment of "hot goods" where Congress specified two express exemptions and there was no indication in the legislative history that Congress considered the status of secured creditors).

C. Payment of Fees to Prisoners Is Consistent With the Broad Purposes of the Witness Fee Statute

The court below referred to language in a committee report accompanying the 1978 amendment. The full sentence is: "Witness fees and allowances now provided pursuant to section 1821, because of inflation, no longer compensate the average witness for the actual costs which witness service entails." H.R. Rep. No. 95-1651, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4631, 4631. Some qualification and amplification of this statement are necessary in order to understand it.

First, the 1978 amendments revised *all* the fees and allowances associated with witness service, not just the

[6] See note 14, *infra*. The statute was also amended in 1796, Act of June 1, 1796, c. 48, § 2, 1 Stat. 492; in 1799, Act of February 28, 1799, c. 19, § 6; and in 1853, Act of February 26, 1853, c. 80, § 3, 10 Stat. 167.

per diem attendance fee. These included the subsistence allowance and travel allowance, both of which relate more directly to the "actual costs" rationale.

Second, the court below misinterpreted or misapplied the legislative reference to the "average witness" by taking it out of context.

Third, the quoted statement refers to the purpose of the *amendment*, which was principally to increase fees and allowances, not the purposes of the underlying entitlement to witness fees. With respect to this more fundamental question, and with specific reference to the attendance fee, the committee report includes these observations:

> "The amounts arrived at in this bill are considered to be more fair than presently existing amounts, although it is recognized that certain witnesses will not, under the proposed rates, be adequately compensated. In order to fairly compensate everyone appearing as a witness it would be necessary to have either a graduated scale of fees, or, leave the amount of such fees in the discretion of the judge. Neither was considered feasible, and therefore *the amounts arrived at herein are more or less arbitrary, but considered to be reasonably fair to the average witness.*" [Citation omitted.] This statement is of equal validity today.
>
> * * *
>
> Since 1968 the average daily income has increased by over 60 percent, while the witness fee has remained the same. Proposed legislation therefore increases the witness fee to $30 per day. This is the minimal level of compensation that constitutes a respectable remuneration for witness service today. As stated above, it is *not intended as reimbursement for lost income*, witness service being a public obligation for which the Government is not required to provide compensation. However, *as a matter of public policy* the Government ought not to take the time of citizens, any more than their property without reasonable compensation. Moreover, fair compensation should be provided *in order to promote respect for citizen participation in our system of justice*. Payment of $30 per day, which translates into an annual wage of $7,500, is the minimally acceptable level for the daily attendance fee.

Id. at 3, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4631, 4632 (emphasis added).

This language emphasizes that it is *not* the purpose of the attendance fee to compensate for lost income, as the court below assumed, but rather to dignify and encourage participation of witnesses in the justice system. The amount prescribed is a fairly arbitrary figure, designed for convenience of administration rather than individual reimbursement. Congress clearly recognized that some witnesses, like prisoners or the unemployed, might be "overcompensated" with respect to their usual income while others with greater earning capacity would be disadvantaged. The report's reference to the "average witness" must be understood in this context. It does not imply, as the court below assumed, that only "average witnesses" are to receive the attendance fee, but rather that a single fee is to be paid to *all* witnesses, regardless of circumstances, in order to achieve an overall result that is "reasonably fair to the average witness." *See also* Hearing Before the Subcomm. on Courts, Civil Liberties, and

the Administration of Justice of the Comm. on the Judiciary, House of Representatives, 95th Cong., 2d Sess. 67 (May 4, 1978) (statement of Raymond Calamaro) ("While witness service is a civic obligation, it is important that the witness fee be sufficient to demonstrate that this is an essential public service and to encourage witnesses to render their services freely and fully.").

Payment of witness fees to prisoners clearly furthers the goals of "encouraging witnesses to render their services freely and fully" and to "promote respect" for witness service. Indeed, because of, not despite, the relatively meager incomes of prisoner witnesses, such payments may be particularly important in promoting the cooperation of witnesses who possess important testimony. Prisoners too may experience additional hardship and deprivation as a result of a summons to serve as a witness. Mr. Demarest, for example, spent several weeks in county jail as a result of his summons, where he was unable to earn his income from prison employment and where conditions were presumably less favorable than in the institution from which he had been removed. Moreover, inmates may be particularly reluctant to testify in some cases for reasons peculiar to their condition. To the extent that payment of fees to inmate witnesses would serve to overcome that reluctance, the interests of justice are better served.[7]

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[7] In addition, the rationale of the court below is inconsistent with administrative practice. For example, witness fees apparently are paid to witnesses who are incarcerated pending their own trial. 6 Comp. Dec. 588 (1900). Yet such witnesses

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Such considerations do not mean, of course, that Congress consciously and expressly stated in the legislative history that convicted prisoners are entitled to the witness fees provided in section 1821, any more than the legislative excerpt relied on below proves the contrary. The exercise simply demonstrates that the application of broad purposes to specific questions of legislative intent is far less precise an inquiry than reading the terms of a statute. *See Mississippi Band of Choctaw Indians v. Holyfield*, 109 S. Ct. 1597, 1607 (1989) ("We have often stated that in the absence of a statutory definition we 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used' " (citation omitted)). Justice Kennedy's observation about the difficulty of construing a statute based on the "spirit of the legislation," instead of its words, is particularly applicable to the majority opinion below: "The problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice." *Public Citizen v. United States Dept. of Justice*, 109 S. Ct. 2558, 2575 (1989) (Kennedy, J., concurring). The language of section 1821 is clear, and its history is at best ambiguous. In such a case the language must control. *Hallstrom*, 110 S. Ct. at 310; *Burlington N. R.R.*, 481 U.S. at 461.

(Continued from previous page)

lose no income by virtue of witness service; they are already incarcerated on other grounds and, in most cases, probably have no ability to earn even the modest income available to prison inmates. Under the principle announced below, they are no more "average witnesses" than convicted inmates, and should not be entitled to a fee.

IV. CONTRARY JUDICIAL AND ADMINISTRATIVE INTERPRETATIONS CANNOT ALTER THE EXPRESS LANGUAGE OF SECTION 1821

The court below relied on prior judicial and administrative interpretations of section 1821 and its predecessors. But judicial opinions on the subject are few and generally do not include any real analysis of the issue presented here. Administrative interpretations or practices deserve no deference in this case. First, any interpretation inconsistent with the clear and unambiguous language of the statute cannot stand; if the Court accepts the analysis contained in Section II of this argument, it must reject any contrary interpretation. Second, neither the Department of Justice nor the Treasury Department is charged with any special responsibility to interpret or enforce section 1821, and their views carry no special weight. Third, there is no indication whatever that Congress ever ratified or adopted any interpretation of the statute contrary to its evident meaning.

A. Judicial Interpretations

The first time a federal appellate court interpreted section 1821 was in *Meadows v. United States Marshal*, 434 F.2d 1007 (5th Cir. 1970), *cert. denied*, 401 U.S. 1014 (1971). The Fifth Circuit did not actually analyze the statute or its language. Indeed, it made no analysis of any kind, but merely reprinted the district court's one-page order denying a writ of mandamus. That order's consideration of the substantive question is contained in a single paragraph denying mandamus because the duty to pay such witnesses was not "clear." 434 F.2d at 1008. The district

court, in effect, treated the prisoner witnesses' claim as if it were conjured from thin air: "No authority has been cited, and this court is aware of none, for the proposition that federal prisoners are entitled to compensation for serving as witnesses in federal court." *Id.* One wonders why the statute itself was not viewed as sufficient authority.

Meadows pointed the false trail that all subsequent courts have blindly followed. *Marchese v. United States*, 197 Ct. Cl. 102, 453 F.2d 1268 (1972), is almost equally brusque. The actual language of the statute is demoted to an initial footnote. Relying principally on *Meadows* and "suggestions" derived from its view of the legislative purpose, the court concluded that there was no reason to "upset" administrative practice. 453 F.2d at 1271.

United States v. Garmany, 762 F.2d 929 (11th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986), cited by the majority below, did not even address the issue, which was not before the court. The only reference to prisoners' entitlement to witness fees occurs in a footnote of dicta in which the court speculates on how the government might have calculated the cost of providing inmate witnesses to a non-indigent defendant. 762 F.2d at 933 n.2.

In re Grand Jury Matter, 697 F.2d 103 (3d Cir. 1982), is a summary affirmance, without any analysis, of a district court order denying fees.[8]

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[8] The district court, in turn, relied on *Meadows* and *Marchese*, along with the "purposes behind the fees, Congressional intent . . . and long-standing Treasury policy." *In re Witness Fees for Prisoner*, 533 F. Supp. 401, 403 (E.D. Pa. 1982).

"In sum, the Government's position is not supported by a long, or even appreciable, body of judicial interpretation." *Crandon v. United States*, 110 S. Ct. 997, 1011 (1990) (Scalia, J., concurring). The *Meadows* decision, which begot this line of cases, was an unreasoned exercise in *ipse dixit*. *See id.* at 1013. Its progeny have perpetuated the error of *Meadows* both in method and result. In each of the judicial opinions on section 1821's application to prisoners, including the opinion below, the courts have looked everywhere except to the statute itself to divine its meaning. Such studious avoidance of the statutory language fatally compromises the value of these opinions, and accordingly they deserve to be disregarded. Prior judicial interpretations of section 1821 "flatly contradict the language of the statute." *Hallstrom*, 110 S. Ct. at 309.

B. Administrative Interpretation

The court below also relied on an opinion of the Comptroller of the Treasury in 1900[9] and Department of

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[9] 6 Comp. Dec. 588 (1900). The Comptroller's opinions on this subject are somewhat more complicated and less clear than this citation suggests. The opinion referred to by the court below actually concludes that a witness held in custody awaiting his own trial on criminal charges *is* entitled to a per diem payment. It refers, however, to an *earlier* Comptroller's opinion which apparently held that convicted prisoners are not. *Id.* at 588. Other courts have relied on two 1939 opinions of the Comptroller General, 18 Comp. Gen. 609 and 18 Comp. Gen. 765, which disapproved the payment of witness fees by U.S. Marshals to convicted prisoners. *E.g., Marchese, supra,* 453 F.2d at 1271. What *Marchese* fails to note, however, is that the

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Justice regulations promulgated in 1986. Joint Appendix, pp. 14-16. But "no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and long-standing agency interpretations must fall to the extent they conflict with statutory language." *Public Employees Retirement System v. Betts*, 109 S. Ct. 2854, 2863 (1989). Moreover, even if they did not conflict with the plain language of the current version of section 1821, these administrative views on the subject are entitled to no particular deference.

1. The Department of Justice

The Department of Justice's views on the subject are contained in a short set of regulations interpreting sections 1821-1825. 28 C.F.R. pt. 21 (1989). A single sentence added at the end of subsection 21.4(d) purports to deprive prisoners of the benefits granted by Congress. The language of the regulation is clearly inconsistent with the actual language of the statute: "A witness in custody for purposes other than 18 U.S.C. 3149 is ineligible to receive the attendance and witness fees provided by this section." 28 C.F.R. § 21.4(d) (1989). This is not "construction" of the statute; it is amendment. *Burlington N. R.R. v. Oklahoma Tax Commission*, 481 U.S. 454, 463 (1987); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988) (regulation

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language of the 1939 version of the statute expressly excluded "detained witnesses" from the witness fee provision. *See* Section III.C., *infra*. The Comptroller General relied on that exclusion, at least in part, in reaching his opinion. 18 Comp. Gen. at 610. The present statute, of course, is to the contrary.

invalid where it cannot be reconciled "under . . . [any] reasonable construction of the statutory language").

There are additional reasons to discount the Department of Justice regulation. Section 21.4(d), first promulgated in 1986, was not contemporaneous with passage of the operative language in 1978. *Public Citizen v. United States Dept. of Justice*, 109 S. Ct. 2558, 2571 n.12 (1989). More fundamentally, no statutory delegation of authority permits the Justice Department "to issue . . . a regulatory definition . . . carrying the force of law." *Id. See Adams Fruit Co. v. Barrett*, 110 S. Ct. 1384, 1390-91 (1990) (no delegation of authority to agency evident in statute; no deference due to agency interpretation). *See also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (EPA regulations promulgated pursuant to Clean Air Act's delegation of authority to that agency to enforce and administer statutory scheme entitled to deference where not inconsistent with statute).

The Department of Justice cited 28 U.S.C. sections 509, 510, and 1821-25 as authority for the promulgation of the regulation. 51 Fed. Reg. 16171 (1986).[10] Section 509 simply vests Department of Justice functions in the Attorney General. Section 510 permits the Attorney General to delegate his authority to other agency officers. Sections 1821-25 are substantive provisions for fees and allowances and specify procedures for their payment. Nowhere in these provisions does it appear that Congress

[10] 5 U.S.C. § 301 is also cited. This statute generally authorizes "the head of an executive Department" to prescribe regulations for the "government of his department" and the "conduct of its employees."

expressly or impliedly delegated any legal discretion whatsoever to the Attorney General or the Department of Justice.[11] Only section 1825 mentions Department of Justice personnel, and the language of that section does not grant discretion; it imposes mandatory ministerial duties.[12] *See Adams Fruit*, 110 S. Ct. at 1391 (limited administrative responsibilities do not create authority to interpret substantive provisions of law).

This is not a case in which highly technical subject matter suggests the need for agency expertise in the interpretation of statutory standards, or where "the

[11] Section 1821 sets fees for all witnesses in federal court, including those subpoenaed by solvent parties. Where the fees are paid by such a party, the Department of Justice plays no role in the administration or payment of fees. *See* 28 U.S.C. § 1825 (1988). Its role is limited to cases where witnesses are called by the government or by indigent criminal defendants. *Id*. Witness fees are also administered in part by court personnel. *Id*.

[12] "The United States marshal *shall pay* all fees of witnesses." 28 U.S.C. § 1825(a) (1988) (emphasis added); "In proceedings in forma pauperis . . . , the United States marshal for the district *shall pay* . . . all fees of witnesses." 28 U.S.C. § 1825(b) (1988) (emphasis added).

If it reveals anything on this subject, the legislative history of the 1978 amendment suggests that the Department of Justice did not ask for, and Congress did not grant, discretionary power in the payment of witness fees. *See* Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, House of Representatives, 95th Cong., 2d Sess. 89 (1978) (testimony of Mr. Calamaro) ("MR. KASTENMEIER: . . . We are apparently not giving anyone discretion with respect to that [fees for witnesses].").

agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-64. The statute leaves no "gap" for the Department of Justice to fill. *Adams Fruit*, 110 S. Ct. at 1390. This is a garden-variety statute dealing with a matter of judicial administration, and concerns a subject intimately familiar to the courts, as did the statute authorizing federal judges to "request" attorneys to represent indigent defendants in *Mallard*. *See also Crandon*, 110 S. Ct. at 1011 (Scalia, J., concurring) ("The law in question, a criminal statute, is not administered by any agency but by the courts."). While the Justice Department has certain ministerial duties in processing payment of fees authorized by section 1821, 28 U.S.C. § 1825(a), (b), the Attorney General should be credited with no more insight into the substantive meaning of section 1821 than the Court itself possesses.[13]

2. The Comptroller General

The Comptroller General has no particular responsibility for interpreting or enforcing section 1821. *See Crandon v. United States*, 110 S. Ct. 997, 1011 (1990) (Scalia, J., concurring). Nor is he vested with the "specific responsibility for administering the law that triggers" the judicial deference prescribed in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Id.* The

[13] Nor is this a case in which significant commercial expectations and investments have crystallized around a long-standing and generally accepted agency interpretation of a statute. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 312 (1988) (Brennan, J., concurring).

Comptroller General's responsibility is simply to insure that Treasury funds are lawfully disbursed under a myriad of statutes and regulations, whether they are intended for witness fees, weapons procurement, or other federal programs.

Finally, the Comptroller's opinions long predate the current statute. Not only have numerous amendments[14] changed the language of the statute, some in ways affecting its interpretation, but these views hark back to a day when the common view was that prison inmates "forfeited" all rights and that their "time and services belonged" entirely to the government. 6 Comp. Dec. 588, 588 (1900).[15]

C. Congress Cannot Be Presumed to Have Adopted Interpretations Contrary to the Language of the Statute

Seeking to strengthen these slim reeds of judicial and administrative interpretation, the court below asserted

[14] Act of April 26, 1926, c. 183, §§ 1-3, 44 Stat. 323; Act of June 30, 1932, c. 314, § 323(b), 47 Stat. 413; Act of March 22, 1935, c. 39, § 3, 49 Stat. 105; Act of December 21, 1942, c. 825, § 1, 56 Stat. 1088; Act of June 25, 1948, c. 646, § 1821, 62 Stat. 950; Act of May 10, 1949, c. 96, 63 Stat. 65; Act of May 24, 1949, c. 139, § 94, 63 Stat. 103; Act of August 1, 1956, c. 826, 70 Stat. 798; Act of March 27, 1968, Pub. L. No. 90-274, § 102(b), 82 Stat. 62; Act of October 13, 1978, Pub. L. No. 95-535, 92 Stat. 2033.

[15] Current Bureau of Prisons regulations make clear that financial incentives are appropriate and necessary rehabilitation techniques. *See, e.g.*, 28 C.F.R. § 545.20 (purpose of "performance pay"), 545.27 (pay grades), 545.29 (achievement awards), 545.30 (special awards), and 545.60 -.63 (incentive awards). *See generally* 28 C.F.R. pt. 345, subpt. B (UNICOR program); 28 C.F.R. pt. 545, subpt. B (Inmate Financial Responsibility Program).

that Congress implicitly adopted them by failing to amend the statute in response to them. "Had Congress meant to change the existing judicial and administrative interpretation of § 1821, it surely could have done so in more express terms." Joint Appendix, p. 15. The lower court's "venture into speculative unrealities"[16] in this case illustrates the dangers inherent in imputing a meaning to congressional silence. There is no indication whatsoever in the legislative history that Congress was aware in 1978 of either the Comptroller's opinions or the *Meadows* and *Marchese* opinions. Moreover, the court below's reasoning – that Congress must amend the clear and unambiguous language of a statute to prevent its amendment by inconsistent judicial and administrative interpretations – turns the proper analysis on its head and confuses the functions of the various branches of government.

The language of the statute itself is not ambiguous, as the opinion below concedes. Joint Appendix, p. 14. In such a case, as Judge Ebel noted in dissent, " '[C]ongressional silence, no matter how "clanging," cannot override the words of the statute.' " Joint Appendix, p. 17 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.13 (1985)). *See Leary v. United States*, 395 U.S. 6, 24-25 (1969) (reenactment by Congress of a statute after agency interpretation cannot save a regulation that contradicts the requirements of the statute itself). *See also Biddle v. Commissioner*, 302 U.S. 573, 582 (1938) (where the law is plain

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[16] *Helvering v. Hallock*, 309 U.S. 106, 120 (1940) (Frankfurter, J.).

the subsequent re-enactment of it does not constitute adoption of its administrative construction).

The majority below indicated in a "cf." citation that it relied on *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986). In that case, however, the Court relied not on congressional inaction in the face of an administrative construction, but rather on Congress' express adoption of the FDIC's regulatory definition of the disputed term when amending the statute. *Id.* Moreover, the case involved the definition of the term of art "deposit" in the complex context of federal banking law by the agency charged with administration of federal deposit insurance programs.

The so-called "re-enactment rule" has been strongly criticized, *e.g.*, J. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture Into Speculative Unrealities*, 64 B.U.L. Rev. 737, 755 (1985), and the Court has properly employed it with increasing caution in recent years. It is typically invoked as a secondary confirmation of an interpretation supported by independent grounds; *e.g., Grove City College v. Bell*, 465 U.S. 555, 568 (1984) (congressional silence "not dispositive"); where there is affirmative evidence that Congress was actually aware of existing interpretations during the amendment process; *e.g., Blanchard v. Bergeron*, 109 S. Ct. 939, 943 (1989); where the interpretation is by an agency specifically charged with the enforcement and administration of the statute and the interpretation appears in formal regulations or adjudication. *E.g., Philadelphia Gear.*

None of these factors exists in the present case. Nothing in the legislative history of section 1821, its predecessors, or related provisions makes any reference to

administrative or judicial interpretations concerning inmate witnesses. This Court has never ruled on the issue, and the two lower court opinions extant in 1978, *Meadows* and *Marchese*, given their brevity and subject matter, can hardly be expected to have achieved notoriety beyond the limited circle of interested parties. The only written administrative interpretations of the statute were based not upon section 1821 but upon different predecessor statutes. These were buried in Comptroller's opinions decades old, and involved, in one case, the disputed sum of $8. 18 Comp. Gen. 609 (1939). Any presumption that Congress was aware of such interpretations in 1978 is a transparent fiction. The Department of Justice is not charged with special responsibilities for the statute, or delegated discretion in making law. *See Adams Fruit*, 110 S. Ct. at 1390-91. In any event, it did not promulgate regulations on the subject until 1986, eight years after the statute's most recent amendment.

An excerpt from the history of the witness fee statute illustrates the dangers inherent in imputing to Congress an intent to endorse obscure administrative constructions based on legislative inaction. There were "administrative interpretations" of the statute in 1939 in the form of two opinions of the Comptroller General. 18 Comp. Gen. 609; 18 Comp. Gen. 765. Both held convicted prisoners ineligible for witness fees, relying in part on language in the contemporaneous version of the witness fee statute which excluded "employees of the Government" and "detained witnesses." Act of April 26, 1926, c. 183, § 1, 44 Stat. 323.[17]

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[17] "[J]urors and witnesses (other than witnesses who are salaried employees of the Government, and detained

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In 1948, Congress amended section 1821. It eliminated the exclusionary language with respect to witness fees, and altered the exclusionary language in the subsistence allowance provision. Act of June 25, 1948, c. 646, § 1821, 62 Stat. 950.[18]

Following the assumptions of the "re-enactment rule," Congress would be presumed to have been aware of these Comptroller General's opinions and the amendment should be regarded as having specifically overruled them. Surely that deliberate and explicit expression of congressional intent overwhelms any presumption that Congress' later silence on the subject impliedly approved those same interpretations. Surely it cannot be presumed that congressional inaction speaks more forcefully than congressional action.

There is no reason to conclude, as did the court below, that Congress ever adopted, or acquiesced in, any administrative interpretation of the statute contrary to its language.

V. THE SPECULATIVE POLICY CONCERNS OF THE COURT BELOW CANNOT JUSTIFY ITS AMENDMENT OF THE STATUTE

"[I]f inmates were to receive a $30 fee for every day they attend court to serve as a witness, which is much

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witnesses) in the United States courts . . . shall be entitled to a per diem for each day of actual attendance."

[18] "A witness attending in any court of the United States . . . shall receive $2 for each day's attendance. . . . Witnesses who are not salaried employees of the Government and who are not in custody . . . shall be entitled to an additional allowance of $3 per day for expenses of subsistence."

more than they make working in prison industries, it is not difficult to imagine the potential abuses that might result." Joint Appendix, p. 16. Here, apparently, is the crux of the matter: the majority of the panel below feared that Congress had been unwise in failing to exclude prisoners and felt impelled to remedy the error.

There is, of course, no factual record from the courts below, and therefore no basis to determine whether the "imagined potential abuses" envisioned by the court below are real or phantasmagorical. It would be interesting to know, for example, how many inmate witnesses presently testify in federal courts, how many of those are summoned by the government and how many by indigent or solvent defendants or by civil litigants, and how the payment of witness fees might affect these statistics. It is possible to speculate that, were solvent criminal defendants required to pay witness fees to inmates, the disincentive might have beneficial effects. *See, e.g., United States v. Garmany*, 762 F.2d 929 (11th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986). Presumably, Congress has the resources available to investigate these questions and formulate appropriate policy in response if it chooses to do so. And unless the law is enforced as written, it will never be known whether the problems imagined by the court below are real or fictional.[19] *See Hurtado v. United States*, 410 U.S. 578, 591 (1973).

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[19] As Judge Ebel pointed out in dissent, the majority's fears about payment to inmate witnesses leave out the role of district court judges in managing cases to prevent abuses. Joint Appendix, pp. 21-22. Experienced trial judges would presumably not permit the courts' power to be abused by issuing writs

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At a minimum, such hypothetical problems cannot justify a conclusion that payment of witness fees to prisoners is an "absurd" application of the statute permitting a departure from the statute's plain language. *See Citicorp*, 483 U.S. at 36-38 (applying sanctions to secured creditors while exempting common carriers and bona fide purchasers of "hot goods" is rational distinction which furthers certain purposes of act, even if all three are innocent parties). *Cf. Green v. Bock Laundry Machine Co.*, 109 S. Ct. 1981, 1985 (1989) (Congress cannot have meant Fed. R. Ev. 609(a)(1) to provide procedural advantage to civil defendants but not to civil plaintiffs when obvious intent of provision was to safeguard rights of criminal defendants).

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in aid of frivolous or self-serving litigation, or by summoning cumulative witnesses. *See* Fed. R. Crim. P. 17(b) (requiring court to subpoena witnesses on behalf of an indigent criminal defendant "upon a satisfactory showing . . . that the presence of the witness is necessary to an adequate defense"). *See also Marks v. Calendine*, 80 F.R.D. 24 (N.D.W. Va. 1978), *aff'd*, 651 F.2d 970 (4th Cir. 1981), cert. denied, 454 U.S. 1151 (1982) (taxing witness costs to prisoner, proceeding in forma pauperis, who brought meritless civil rights action against warden and others). In any event, it is for Congress to decide whether potential abuses outweigh the potential benefits of encouraging "free and full" testimony from inmates who possess important testimony.

CONCLUSION

> In conclusion, this is not an instance in which a statute produces an "unfathomable" result and "can't mean what it says." . . . Section 1821 is neither internally inconsistent nor facially ambiguous. Under a plain reading of the statute, prisoners serving as witnesses are entitled to attendance fees but not to subsistence allowances. That result is neither illogical nor irrational. There is no legislative history showing conclusively that the statute does not mean what it says. Consequently, . . . prisoners, like other witnesses, are entitled to witness attendance fees under Section 1821.

Joint Appendix, p. 22 (citations omitted) (Ebel, J., dissenting).

Because the court below denied him the fees to which he is entitled under section 1821, Petitioner respectfully requests that the judgment of that court be reversed, and that the case be remanded to the court of appeals with instructions to remand in turn to the district court for entry of an order requiring the clerk to certify that Mr. Demarest is entitled to payment of $300 from the United States Marshal pursuant to 28 U.S.C. section 1825(a).

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In the Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD S. DEMAREST, PETITIONER

v.

JAMES MANSPEAKER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether petitioner, a convicted state prisoner who testified as a defense witness in a federal criminal case, is entitled to receive a witness fee under the federal witness fee statute, 28 U.S.C. 1821.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-5916

RICHARD S. DEMAREST, PETITIONER

v.

JAMES MANSPEAKER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (J.A. 11-22) is reported at 884 F.2d 1343. The order of the district court (J.A. 9-10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1989. A petition for rehearing was denied on October 23, 1989. J.A. 24. The petition for a writ of certiorari was filed on October 28, 1989, and was granted on April 23, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1821 and 1825 of Title 28, United States Code, are set forth in pertinent part in an appendix to this brief.

STATEMENT

1. In March 1988, petitioner was serving a state criminal sentence at the Arkansas Valley Correctional Facility in Crowley, Colorado. The defendant in a federal criminal case, *United States* v. *Ronald Brooks Tippett*, No. 87-CR-386 (D. Colo.), requested the district court's assistance in arranging for petitioner to testify as a defense witness. The court issued a writ of habeas corpus ad testificandum directing the United States marshal and the state prison authorities to produce petitioner at trial.

On March 3, federal marshals transferred petitioner from the state prison to the Denver County Jail. The *Tippett* trial began on March 7 and ended on March 18; petitioner testified on March 15. Petitioner remained at the Denver County Jail until April 5, when he was returned to the Arkansas Valley Correctional Facility. J.A. 2, 9.

Invoking the federal witness fee statute, 28 U.S.C. 1821, petitioner sought to obtain a fee for his service as a witness. Petitioner asked respondent James Manspeaker, the clerk of the district court, to certify under 28 U.S.C. 1825(a)(2) that petitioner was eligible to receive a witness fee, and to forward that certification to the United States marshal for payment of the fee. J.A. 2.[1]

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[1] Petitioner sought the $30 per day witness attendance fee (see 28 U.S.C. 1821(b)) for a period of 10 days—the two days he spent traveling between the state prison and the county jail and the eight days he spent at the county jail pending the trial proceedings. J.A. 3.

Respondent Manspeaker did not prepare the certification. Instead, he forwarded petitioner's request to the United States Attorney, who advised petitioner that he was not entitled to a witness fee for his service as a witness in the *Tippett* trial. J.A. 2-3.

2. On May 25, 1988, petitioner filed an action against respondent Manspeaker and a deputy clerk of the district court, seeking an order directing respondent to certify petitioner's request for the witness fee. J.A. 1-8, 9. On June 1, the district court denied the petition and dismissed the complaint. J.A. 9-10. The court concluded that petitioner's action was meritless because "[i]nmate witnesses are not entitled to receive witness fees." J.A. 9 (citing *United States* v. *Garmany*, 762 F.2d 929, 933 n.2 (11th Cir. 1985); *In re Grand Jury Matter*, 697 F.2d 103, 104 (3d Cir. 1982); *Meadows* v. *United States Marshal*, 434 F.2d 1007, 1008 (5th Cir. 1970), cert. denied, 401 U.S. 1014 (1971)).

3. A divided panel of the court of appeals affirmed. J.A. 11-22.[2] In the court of appeals, petitioner contended "that the plain language of [28 U.S.C. 1821(a)(1) and (b)] mandate the payment of attendance fees to a witness, regardless of whether or not that person is incarcerated." J.A.

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[2] Three other convicted state prisoners, who had testified as defense witnesses at the *Tippett* trial, also filed actions in the district court seeking witness fees. The district court dismissed each action. The court of appeals consolidated the appeals from those orders with petitioner's appeal. J.A. 11-13; see Pet. 4. Those prisoners have not sought review of the appellate court's judgment in this Court.

14. The court of appeals, however, concluded that "[d]espite the unqualified wording of [28 U.S.C. 1821(a)(1) and (b)], strong evidence exists to support the view that Congress never intended § 1821 to apply to individuals incarcerated for criminal acts." J.A. 14. The court observed that "[s]ince at least the year 1900, the Treasury Department has taken the position that imprisoned individuals, other than those detained as a material witness, are not entitled to witness fees." J.A. 14 (citing 6 Dec. Comp. Treas. 588, 588 (1900)). And in the early 1970s, two federal courts held that the similarly drafted predecessor to Section 1821 "did not entitle criminal inmates to witness attendance fees." J.A. 15 (citing *Marchese* v. *United States*, 453 F.2d 1268, 1271 (Ct. Cl. 1972); *Meadows* v. *United States Marshal*, 434 F.2d at 1008). When Congress revised Section 1821 in 1978, the court pointed out, "[n]owhere in the express language of the revisions or in the legislative history did Congress indicate criminal inmates, other than material witnesses detained for want of security for his appearance, were entitled to a witness fee." J.A. 15. "Had Congress meant to change the existing judicial and administrative interpretations of § 1821," the court thus concluded, "it surely could have done so in more express terms." J.A. 15.[3]

[3] The court pointed out that since the 1978 revisions, other courts of appeals have also determined that convicted prisoners are not entitled to witness fees under Section 1821. J.A. 16 (citing *United States* v. *Garmany*, 762 F.2d 929, 933 n.2 (11th Cir. 1985); *In re Grand Jury Matter*, 697 F.2d 103, 104 (3d Cir. 1982), aff'g *In re Witness Fees for Prisoners*, 533 F. Supp 401 (E.D. Pa. 1982)). The court noted that the Department of Justice has promulgated regulations to the same effect. J.A. 16 (citing 28 C.F.R. 21.4(d)).

Finally, the court identified two other factors supporting the view that convicted prisoners are ineligible to receive witness fees. First, Congress revised Section 1821 in 1978 "because existing witness fees and allowances 'no longer compensate the average witness for the actual costs which witness service entails.'" J.A. 16 (quoting H.R. Rep. No. 1651, 95th Cong., 2d Sess. 2 (1978)). Other than the loss of "the very modest compensation they might receive from participating in prison job programs," the court reasoned, convicted prisoners "generally do not incur financial costs serving as a witness." J.A. 16. Second, the court envisioned a potential for abuse in circumstances that would encourage prisoners to file suit and seek to have "friends among inmates [testify] as witnesses, not only for the trip they would receive outside the prison, but for the profit from the witness fee." J.A. 16.

Judge Ebel dissented. J.A. 17-22. In his view, the court "mistakenly has ruled upon congressional silence and upon the [court's] own policy desires to abrogate the plain language of the statute." J.A. 17. Judge Ebel stated that the language of Section 1821 was "clear and unambiguous," and that "[n]othing in the statute states that 'a witness' excludes witnesses who happen to be prisoners." J.A. 17.

SUMMARY OF ARGUMENT

A. Petitioner, a convicted state prisoner who testified as a defense witness at a federal criminal trial, seeks a witness fee for that service. As a threshold matter, however, petitioner is not entitled to the necessary certification under 28 U.S.C. 1825(a)(2)—the relief he sought in the courts below—since he has not satisfied the statutory requirements. In order to receive such a certification in the circumstances presented, the witness must appear "under a subpoena issued upon the approval of the court" and must have "an affidavit of [the witness's] attendance" prepared by the defendant's attorney. Here, however, petitioner asserted that he appeared at trial under a writ of habeas corpus ad testificandum, not under a subpoena, and he made no claim that the defendant's counsel prepared the requisite affidavit. Since petitioner's own pleadings failed to show his entitlement to the certification, the courts below properly denied his claims for relief against the clerk of the court.

B. Under the federal witness fee statute, 28 U.S.C. 1821, attendance fees are not payable to convicted prisoners who serve as witnesses. The statutory requirement that the witness be "in attendance" at a federal court proceeding refers to a witness who has been summoned to be present by process directed to him and who then makes himself available to testify by "attending" the trial. A convicted prisoner, such as petitioner, appears at trial under a writ of habeas corpus ad testificandum issued to his custodian. A prisoner thus does not "attend" the trial in response to process issued to him, but rather is "produced" for trial as a result of process issued to his custodian.

The structure and purposes of the witness fee statute fully support this construction of the statutory language. Section 1825, which implements the witness fee entitlements of Section 1821, clearly contemplates that defense witnesses such as petitioner will be paid a witness fee only if they testify pursant to a subpoena. Accordingly, Section 1825 indicates that witnesses "in attendance" at a trial (and thus entitled to a witness fee) do not include witnesses, such as convicted prisoner witnesses, whose presence is obtained by process issued to their custodians, rather than by summoning the witnesses themselves.

The history of federal witness fee legislation over the past 200 years confirms that Congress has not granted witness fees to convicted prisoners. Although the federal witness fee statute has been amended many times, convicted prisoners have never explicitly been granted witness fees and have not been awarded fees in practice. Moreover, the policy underlying the witness fee statute is to compensate witnesses for the costs of attending court. Prisoners, who suffer no such costs, are therefore not within the class of intended beneficiaries of the statute.

Finally, the long and consistent line of judicial decisions, administrative rulings, and practical experience in this area show that Congress has been legislating against a background in which prisoners have never been considered eligible to receive witness fees. In these circumstances, there is no reason to disturb the court of appeals' decision denying witness fees to petitioner.

ARGUMENT

PETITIONER IS NOT ENTITLED TO WITNESS FEES UNDER THE FEDERAL WITNESS FEE STATUTE

A. Petitioner Has Not Satisfied The Requirements Of 28 U.S.C. 1825

Regardless of whether convicted prisoners are generally eligible for witness fees under the federal witness fee statute, there is a threshold barrier to petitioner's claim in this case. Petitioner has failed to satisfy two of the statutory prerequisites to the relief he seeks.

Petitioner seeks an order requiring respondent Manspeaker to certify that petitioner attended court as a witness in the criminal case against Ronald Brooks Tippett. The statutory duty to make such a certification in appropriate cases is set forth in 28 U.S.C. 1825(a)(2). Under that provision, the clerk of the district court is required to make such a certification, but only when (1) the defendant is represented by appointed counsel, (2) the witness was a defense witness appearing under a subpoena issued upon approval of the court, and (3) the defendant's attorney files "an affidavit of [the witness's] attendance" with the clerk of the court. 18 U.S.C. 1825(a).

In his request for relief filed with the district court, petitioner alleged that Tippett was represented by appointed counsel, J.A. 3, but he failed to allege that the other two requirements of Section 1825(a)(2) were satisfied. He asserted that his presence at the trial had been obtained by writ of habeas corpus ad testificandum, rather than by subpoena, J.A. 2, and he made no claim that Tippett's counsel had prepared an affidavit regarding petitioner's attendance at the trial.

Because the witness fee statute imposes no duty on the clerk of the court unless the three statutory conditions are satisfied, the clerk was not required to prepare the certificate that petitioner requested. For that reason, the district court properly denied petitioner's request and dismissed his complaint, without regard to whether an incarcerated prisoner may ever receive witness fees in a federal criminal case.[4]

B. Convicted Prisoners Are Not Entitled To Receive Witness Fees

The federal witness fee statute provides that fees and allowances shall be paid to witnesses "in attendance" at a federal court proceeding. 28 U.S.C. 1821(a)(1). Petitioner regards the term "in attendance" as meaning simply "present" at the trial. We submit that the term means more—that it refers to a witness who has been summoned to be present and who makes himself available to testify by "attending" the trial. In *Hurtado* v. *United States*, 410 U.S. 578 (1973), this Court employed the definition we suggest when it characterized the federal witness fee statute, and the term "attendance" in particular, as "reach[ing] those witnesses *who have been summoned* and are in necessary attendance on the court, in readiness to testify." 410 U.S. at 584 (emphasis added). Under that definition, a witness who has not been summoned is not "in attendance," and is there-

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[4] The issue of petitioner's noncompliance with Section 1825(a)(2) was not addressed by the courts below, and it was not raised by the government, which filed no brief in the district court or in the court of appeals in petitioner's case. Nonetheless, because a respondent "may rely upon any matter appearing in the record in support of the judgment below," *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982), this Court may affirm the judgment of the court of appeals on that ground. See *Schweiker* v. *Hogan*, 457 U.S. 569, 585 & n.24 (1982).

fore ineligible to receive an attendance fee even though he is a witness and is present at the trial.

Petitioner asserts that the plain meaning of the statute resolves this case, and that he is entitled to a witness fee because he was both "a witness" and "in attendance" at the trial. But the statute is not as broad as petitioner's argument suggests. For example, a party to a lawsuit who takes the stand in his own behalf is a "witness" who is "in attendance" at the trial, as petitioner uses that term. Yet it has long been settled that a party who testifies is not entitled to witness fees. See *The Wahkenna*, 51 F.2d 106, 108-109 (W.D. Wash. 1931); *The Philadelphia*, 163 F. 438, 439 (E.D. Pa. 1908); *Roundtree* v. *Rembert*, 71 F. 255 (C.C.D.S.C. 1896); *The Progress*, 48 F. 239, 240 (E.D. Pa. 1891). Although a party-witness is both a witness and present at trial, he does not "attend" the trial in the sense that term is used in Section 1821, since he does not have to be summoned to the place of trial, abandoning his other activities in order to comply with the order to appear as a witness.

Because the statutory term "in attendance" does not include all persons who are both witnesses and present at trial, it is necessary to go beyond the colloquial use of that term in order to understand the scope of the statute. We submit that our narrower interpretation of that statutory language is consistent with both the structure of the statute and its purposes, as revealed by its history.

1. *The Structure Of The Statute*

An important clue to the scope of Section 1821(a) can be found in Section 1825, which sets forth the procedure by which witnesses are to be paid the fees due them. In the case of indigent defendants, Section

1825(a) provides for the payment of fees to defense witnesses "appearing pursuant to subpoenas issued upon approval of the court." That provision contemplates that only defense witnesses appearing under subpoena are entitled to receive witness fees. Witnesses whose appearance is obtained by other means are not paid any witness fee at all.

Most trial witnesses are summoned by subpoena. Prisoners, however, are not subpoenaed, since they do not control their whereabouts and therefore are not free to comply with the subpoena's command. See *Story* v. *Robinson*, 689 F.2d 1176, 1179 (3d Cir. 1982); *In re Thaw*, 166 F. 71, 74-75 (3d Cir. 1908) ("If the desired witness is confined in jail * * * a subpoena would be of no avail, since he could not obey it and his custodian would still lack authority to bring him."). Instead, the presence of a prisoner witness is obtained by the writ of habeas corpus ad testificandum, which is directed to the prisoner's custodian and which orders the custodian to produce the prisoner at a particular time and place. See *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U.S. 34, 38-39 (1985); *United States* v. *Hayman*, 342 U.S. 205, 220-222 (1952); see also 8 Wigmore, *Evidence* § 2199 (McNaughten rev. ed. 1961); S. Rapalje, *A Treatise on the Law of Witnesses* § 301, at 515-516 (1887).[5]

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[5] The common law writ of habeas corpus ad testificandum was codified in Section 14 of the Judiciary Act of 1789, ch. 20, 1 Stat. 81-82, which provided for issuance of the writ with respect to "prisoners in jail * * * where they * * * are necessary to be brought into court to testify." See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94, 99 (1807). Statutory authorization for the ad testificandum writ has existed since that time, and the current federal habeas corpus statute provides

Because the writ of habeas corpus ad testificandum runs against the custodian, the prisoner's presence at trial is the result of his custodian's decision to comply with the demands of the writ. Thus, while a "writted" prisoner is present at the trial, he does not "attend" the trial in response to process issued to him, but rather is "produced" for trial in response to process issued to his custodian.[6]

Petitioner argues that the structure of the statute supports his interpretation of its scope. In particular, he contends that the express exception of incarcerated witnesses from those eligible to receive the subsistence allowance provided by Section 1821(d)(1) "removes any doubt that an incarcerated witness is a 'witness' within the meaning of subsection (a)(1)." Br. 15.

While subsection (d)(1) of Section 1821 may indicate that an incarcerated witness is a "witness," it does not suggest that such a witness is entitled to an attendance fee under subsection (a)(2). Congress needed to except incarcerated witnesses from subsection (d)(1), because otherwise that subsection could be read to provide a subsistence allowance to all witnesses, whether incarcerated or not. By contrast, since the attendance fee is to be paid only for "attendance," 28 U.S.C. 1821(b), and since convicted prisoner witnesses do not "attend" the trial, Congress had no need to include a specific exclusion for convicted prisoners in subsection (b).

That same point provides the answer to petitioner's reliance on Section 1821(e), which renders certain illegal aliens ineligible to receive witness fees and allowances. Petitioner argues (Br. 20-21) that the express exclusion of illegal aliens shows that Congress did not intend to exclude another category of witnesses—convicted prisoners—from receiving witness fees. But it was not necessary for Congress to create an explicit exemption for convicted prisoners if, as we contend, prisoner witnesses were already barred from receiving attendance fees by the requirement that eligible witnesses "attend" the trial, *i.e.*, that they be summoned to testify and appear in response to that summons.[7]

2. *The History Of The Statute*

The history of federal witness fee legislation over the past 200 years makes three points clear. First, convicted prisoners have never been paid witness fees and have never been regarded as eligible for such

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that the writ shall "extend to a prisoner * * * [where it] is necessary to bring him into court to testify * * *." 28 U.S.C. 2241(c)(5); see *United States* v. *Mauro*, 436 U.S. 340, 357 (1978). In accordance with the common law antecedents, the habeas corpus statute provides that the writ "shall be directed to the person having custody of the person detained," and that "the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained." 28 U.S.C. 2243. See generally 1 J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 21.1, at 303 (1988); 1 *Prisoners and the Law* 12-5 (I. Robbins ed. 1989).

[6] For that reason, petitioner's contention (Br. 25-29) that payment of fees to convicted prisoner witnesses will further Congress's goal of encouraging individuals to testify is wide of the mark.

[7] As the Court made clear in *Hurtado*, a detained material witness is "in attendance" at the court before which he is to testify, since he is summoned by a process that in effect amounts to service of a subpoena with a special guarantee of appearance. Unlike a convicted prisoner, a material witness is detained for the purpose of giving testimony. His detention is thus part of the process of summoning him to testify.

fees.[8] Second, witness fees have traditionally been extended only to witnesses summoned by subpoena or the equivalent, a class that does not include convicted prisoners. Third, the policy underlying the witness fee statute has always been to compensate witnesses for the inconvenience and expense of having to testify, and that policy does not apply to convicted prisoners.[9]

The current witness fee statute, 21 U.S.C. 1821, traces its origin to legislation enacted in 1792. Act of May 8, 1792, ch. 36, § 3, 1 Stat. 277.[10] Since then, Congress has expressly provided fees for only one class of imprisoned witnesses—persons detained as material witnesses.

The 1792 witness fee statute provided that "witnesses summoned in any of the courts of the United

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[8] Petitioner has not been able to identify a single instance under federal or state practice in which a convicted prisoner received a witness fee.

[9] Petitioner contends (Br. 11-21) that resort to the legislative background of Section 1821 is improper where the terms of the statute are clear and unambiguous. As we have discussed, however, the language of the statute is not dispositive in petitioner's favor. Review of the historical background of the statute is therefore appropriate, particularly since the federal witness fee statute "did not flare on the legislative scene with the suddenness of a meteor." *Public Citizen* v. *United States Department of Justice*, 109 S. Ct. 2558, 2567 (1989). See generally *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 432 (1986); *Watt* v. *Alaska*, 451 U.S. 259, 267-273 (1981); see also *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48 (1928) (Holmes, J.).

[10] Three years earlier, the First Congress had enacted a general statute providing that modes of process and rates of fees would be the same as in the State in which the lawsuit was filed. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93.

States" would receive "the same compensations in each state respectively as are allowed in the supreme courts of the same." Although evidence of contemporary state practice is sparse, Congress's use of the term "summoned" is telling.[11] That term referred to the legal process by which federal marshals called persons for service as witnesses—the issuance and service of a subpoena.[12] See H.R. Rep. No. 50, 32d

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[11] In 1807, the Senate received a compendium of state witness fee statutes, apparently as part of a continuing oversight of federal court fees and costs. See American State Papers, Class 10: S. Misc. Doc. No. 237, Vol. 1, at 656 (1807) (S. Rep., *Table of Fees and Compensation of the Attorneys and Officers, Jurors and Witnesses, of Courts in Each State*, 10th Cong., 1st Sess. (1807)). Of the provisions reported from 17 States, a majority simply provided a flat fee and travel allowance for "witnesses" who appeared before state courts. Those statutes shed little light on the practice regarding prisoner witnesses. See, *e.g.*, *id.* at 657 (New Hampshire); *id.* at 674 (Connecticut).

A number of the reported state laws, however, suggest a practice of excluding prisoner witnesses from receiving the statutory fee. Ohio, for example, paid witness fees only to those persons "going to, attending at, and returning from court, under a subpoena * * *." American State Papers, Class 10: S. Misc. Doc. No. 237, *supra*, at 700. The practice under that provision would have excluded convicted prisoners since they would not have appeared in court under subpoena. Moreover, several state laws referred to a witness's attendance in court within or outside "his own country," *id.* at 669 (New York); *id.* at 696 (Kentucky), or his "home" or "place of residence," *id.* at 658 (Massachusetts); *id.* at 673 (New Jersey). Prisoners, by virtue of their incarceration, did not acquire legal residence at the jail, and thus do not appear to be the sort of witnesses the statutes sought to compensate.

[12] See Act of May 8, 1792, ch. 36, § 3, 1 Stat. 276; 3 W. Blackstone, *Commentaries* *279; J. Goebel & T. Naughton, *Law Enforcement in Colonial New York* 400, 416, 425, 432 (1944).

Cong., 1st Sess. 3 (1852) ("[w]itnesses have always been summoned by serving on them a writ of subpoena"; the act of "summoning a witness" generally means "serving a writ of subpoena"). Convicted prisoners, however, could not be brought to court by such process. The original witness fee statute therefore did not make witness fees available to prisoners.

In 1796, Congress for the first time established a specific fee (50 cents per day) for witnesses "attending in the courts of the United States." Act of June 1, 1796, ch. 48, 1 Stat. 492. Although Congress omitted the term "summoned" that was contained in the previous law, there is no suggestion that Congress intended to alter the class of persons to whom the fees would be paid: the reference to witnesses "attending" was apparently regarded as equivalent to the reference in the earlier statute to witnesses who were "summoned" and who appeared in response to the summons. See generally American State Papers, Class 10: H.R. Misc. No. Doc. 61, Vol. 1, at 120-122 (1795) (H.R. Rep., *Fees of Courts*, 3d Cong., 2d Sess. (1795)).

The absence of any intention to broaden the class of witnesses entitled to fees was confirmed by Congress's revision of the witness fee statute in 1799. In that enactment, Congress provided for "witnesses summoned in any court of the United States, the same allowance as is above provided for jurors," namely,

> for each day he shall attend in court, one dollar and twenty-five cents; and for travelling, at the rate of five cents per mile, from their respective places of abode, to the place where the court is holden, and the like for returning.

Act of Feb. 28, 1799, ch. 19, § 6, 1 Stat. 626. Once again, Congress's use of the term "summoned" appears to have restricted the statute's reach to those witnesses whose appearance was produced by subpoena or its equivalent. See *United States* v. *Williams*, 28 F. Cas. 646 (C.C.D.D.C. 1804) (No. 16,709) (out-of-town witness who testified before grand jury may receive fees, because although witness was not subpoenaed, he testified at the request of the United States attorney in lieu of a subpoena). And the allowance for travel between the witnesses' "respective places of abode" and "the place where court is holden" obviously did not contemplate that prisoners would be among the beneficiaries of the statute.

Congress next revised the witness fee statute in 1826, when it enacted legislation providing fees for persons detained as material witnesses. See Act of May 20, 1826, ch. 75, 4 Stat. 174. The incarceration of material witnesses unable to post bond sufficient to assure their appearance was authorized by the Judiciary Act of Sept. 24, 1789, ch. 20, § 33, 1 Stat. 91, passed by the First Congess.[13] At that time, however, Congress enacted no provision authorizing payment of fees to such detained witnesses. See *Hurtado* v. *United States*, 410 U.S. at 586 n.7. In the absence of such a provision, there was uncertainty as to whether such witnesses were entitled to fees.[14]

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[13] The current material witness statute is codified at 18 U.S.C. 3144.

[14] Compare *Higginson's Case*, 12 F. Cas. 132 (C.C.D.D.C. 1802) (No. 6,471) (detained witness entitled to fees "for the whole time she was detained") with American State Papers, Class 9: H.R. Claims Doc. No. 130, Vol. 1, at 263 (1802) (H.R. Rep., *Imprisonment of a Witness in Default of Security*,

Congress responded to the problem by authorizing United States marshals to pay detained material witnesses an attendance fee for each day they were imprisoned. Act of May 20, 1826, ch. 75, 4 Stat. 174.[15] Congress adopted that provision in response to a grievance filed by several detained witnesses who had testified as government witnesses in criminal cases, but were unable to collect witness fees for their service. H.R. Rep. No. 87, 19th Cong., 1st Sess. 1 (1826). The express extension of witness fees to one class of imprisoned witnesses—detained material witnesses—strongly suggests that other imprisoned witnesses, such as convicted prisoner witnesses, were not within the general class of witnesses entitled to the statutory fee.[16]

7th Cong., 1st Sess. (1802)) (Claims Committee recommends rejecting private petitioner's request for witness fees for period of time she was detained as a material witness, where federal court had allowed her only "the customary fees for the time she actually attended as a witness"); see also 1 Op. Att'y Gen. 424 (1820); 1 Op. Att'y Gen. 344 (1820).

[15] See also American State Papers, S. Exec. Doc. No. 73, Vol. 9 (1852) (S. Rep., *Report of the Secretary of the Treasury*, 32d Cong., 1st Sess. 10 (1852)) (recounting Congress's enactment of 1826 legislation in response to opinions of the Attorney General).

[16] Congress again revised the witness fee statute in 1853 as part of a general revision of the schedule of fees and costs in federal courts. Act of Feb. 26, 1853, ch. 80, § 3, 10 Stat. 167; see H.R. Rep. No. 50, 32d Cong., 1st Sess. 1-6 (1852). In examining the fees United States marshals received for serving process, the House Judiciary Committee distinguished between the fee for summoning ordinary witnesses by subpoena and the fee for bringing prisoners into court by writ of habeas corpus. See *id.* at 3-4, 5; see also *id.* at 17-19.

In 1899, the Comptroller of the Treasury issued an opinion upholding the practice of not paying fees to convicted prisoners. A United States marshal had sought the Comptroller's authorization to pay a witness fee and travel allowances to a convicted federal prisoner who testified as a government witness before a United States commissioner. The Comptroller declined to authorize the disbursement, concluding that there was "no provision of law for the payment of witness fees to a person imprisoned in a penitentiary or jail, except in the case of a person who is detained in prison as a witness for want of security for his appearance * * *." 9 Decisions and Letters, Office of the Comptroller of the Treasury 860, 860 (June 12, 1899). The travel allowance was inapplicable, the Comptroller explained, because "[a] person in a penitentiary convicted of crime, while so serving his sentence, can not legally be said to have any place of residence." *Id.* at 861. And such a witness is not entitled to a fee for his appearance because, as a result of the criminal conviction and sentence, he "thereby forfeits his time to the Government." *Ibid.*

Congress revised the witness fee statute in 1926. In addition to the attendance fee, the 1926 statute granted witnesses (other than government employees and detained witnesses) a subsistence allowance of $3 per day. Act of Apr. 26, 1926, ch. 183, §§ 1, 3, 44 Stat. 323, 324.[17] In establishing a subsistence al-

[17] The Act did not repeal the provision of prior law (Revised Statutes § 848) that granted detained material witnesses compensation of $1 per day. That provision from prior law survived because the 1926 statute repealed only those portions of the prior law that were in conflict with the 1926 legislation. Act of Apr. 26, 1926, ch. 183, § 5, 44 Stat. 324.

lowance for ordinary witnesses, Congress sought to "take care of [the] necessary expenses" incurred by witnesses subpoenaed to testify at trial. H.R. Rep. No. 308, 69th Cong., 1st Sess. 2-3 (1926); see also *Fees of Witnesses and Jurors: Hearing on H.R. 70, H.R. 120, H.R. 5216, H.R. 5417, H.R. 6092, and H.R. 8384 Before the House Comm. on the Judiciary*, 69th Cong., 1st Sess. 6 (1926) (statement of Rep. Burtness) ("A witness who is subpoenaed by the arm of the Government to appear in a criminal prosecution and is treated in that way [*i.e.*, not paid sufficient fees to cover traveling and living expenses] can not be blamed very much, perhaps, if he has not always a friendly attitude to the court or to his Government. He often proves a difficult witness in various respects for the Government. He should receive fair treatment."); *Fees of Jurors and Witnesses: Hearing on H.R. 2860, H.R. 2909, and H.R. 6578 Before the House Comm. on the Judiciary*, 68th Cong., 1st Sess. 10-12 (1924). The emphasis on providing compensation for losses incurred as a result of service as a witness obviously had no application to convicted prisoners.[18]

Other than altering the amounts of the fees, Congress did not significantly alter the language of the 1926 statute until the 1948 Revision of the Judicial Code.[19] In the 1948 Revision, Congress reworded the

[18] Following the enactment of the 1926 statute, the Comptroller General reaffirmed the view of his office that "[t]here is no provision of law for payment of witness fees to a person imprisoned in a penitentiary, jail, or other State institution—serving sentence—the prisoner being already under judicial control and the State or county being charged with his care and support." 18 Comp. Gen. 609, 610 (1939).

[19] The Act of June 30, 1932, ch. 314, § 323, 47 Stat. 413, reduced the per diem fee authorized to be paid to witnesses from $2 to $1.50 and suspended entirely the subsistence fee. The Act of Mar. 22, 1935, ch. 39, § 3, 49 Stat. 105, restored the subsistence fee, and the Act of Dec. 24, 1942, ch. 825, § 3, 56 Stat. 1088, again increased the per diem fee to $2.

witness fee statute and adopted a version of Section 1821 generally similar to the current version. See Act of June 25, 1948, ch. 646, 62 Stat. 869, 950. The following year, Congress raised the amount of the fees and allowances under the witness fee statute. Act of May 10, 1949, ch. 96, 63 Stat. 65. Once again, the pertinent committee report made clear that the purpose of the statute was "to fairly compensate the individual either for his time or expenses incident to his service as a witness," S. Rep. No. 187, 81st Cong., 1st Sess. 1 (1949), a policy that is inapplicable to prisoner witnesses.[20]

In 1968 and 1978, Congress again raised the fees and allowances for witnesses. On both occasions the pertinent committees reiterated that the increases were needed to serve the policy underlying the statute, namely, to make witness service "less burdensome," S. Rep. No. 891, 90th Cong., 1st Sess. 36 (1967), and to "compensate the average witness for the actual costs which witness service entails," including the "variety of incidental travel expenses which witnesses routinely incur," S. Rep. No. 756, 95th Cong., 2d Sess. 1-2 (1978); see H.R. Rep. No. 1651, 95th Cong., 2d Sess. 2 (1978). As both the House and Senate Judiciary Committees stated in 1978,

[20] The 1949 statute also reinstated the $1 per day compensation paid to detained material witnesses, which had been "inadvertently omitted" from the 1948 Revision of the Judicial Code. H.R. Rep. No. 352, 81st Cong., 1st Sess. 16 (1949).

> As a matter of public policy the Government ought not to take the time of citizens, any more than their property, without reasonable compensation. * * * Fair compensation should be provided in order to promote respect for the participation in our system of justice.

H.R. Rep. No. 1651, *supra*, at 3; S. Rep. No. 756, *supra*, at 2.

These concerns were obviously directed at ordinary witnesses, forced to abandon their chosen pursuits in order to take the time to testify. Convicted prisoners, by contrast, were not being asked to forgo other activities that they had the liberty to pursue. Such witnesses therefore were not within the scope of congressional concern.[21]

As part of the 1978 legislation, and in response to this Court's decision in *Hurtado* v. *United States*, *supra*,[22] Congress increased the compensation to detained material witnesses. See 28 U.S.C. 1821(d)(4). In so doing, Congress nowhere suggested a break

[21] See also *Marshals Service Fees, Witness Fees and Amendments to the Jury Service Act: Hearing Before the Subcomm. on Improvements in Judicial Machinery of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 41-42, 94-97 (1977); *Judicial Housekeeping: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 80-82 (1978).

[22] In *Hurtado*, the Court held that under the predecessor version of Section 1821, "a material witness who has been incarcerated is entitled to the $20 compensation for every day of confinement during the trial or other proceeding for which he has been detained." 410 U.S. at 586. The Court reasoned that such a witness "is in the same position as a nonincarcerated witness who is summoned to appear on the first day of trial, but on arrival is told by the prosecutor that he is to hold himself ready on a later day in the trial." *Id.* at 587. For those days in detention before the proceeding began, however, the Court concluded that the statute provided the detained witness only $1 per day. *Id.* at 583-584, 588.

with the well-established past practice of not paying convicted prisoners an attendance fee for their service as witnesses. To the contrary, Congress explained that

> [a]lthough [it] has adjusted other witness fees and allowances to reflect increasing costs, it has made no change in the $1 compensation for incarcerated witnesses [*i.e.*, detained material witnesses]. * * * Ironically, present statutes restrict the category of witnesses upon whom courts may impose the burdens of incarceration but do not provide reasonable compensation to those upon whom such burdens fall.
>
> The proposed legislation amends 28 U.S.C. 1821 to provide that a material witness * * * shall receive a daily attendance fee for each day of his confinement. This approach would not only provide more reasonable compensation for the inconvenience and financial hardships which detention entails but would eliminate the peculiarities of the system of compensation which the Supreme Court mandated by its decision in *Hurtado*.

H.R. Rep. No. 1651, *supra*, at 5; accord S. Rep. No. 756, *supra*, at 3-4. Far from supporting the availability of an attendance fee for convicted prisoner witnesses, the language and policy of the statute providing fees for detained material witnesses demonstrate a concern to compensate persons who would be free to do as they please but for their obligation

to appear as witnesses. See *Hurtado*, 410 U.S. at 581; *id.* at 594 (Brennan, J., concurring). Providing attendance fees for detained material witnesses is therefore consistent with the underlying policy of the witness fee statute; providing attendance fees to convicted prisoner witnesses would not be.

3. *The Uniform Decisional Law and Administrative Interpretation*

At the time Congress amended the witness fee statute in 1978, two federal courts and the Comptroller General had addressed the question whether convicted prisoners are entitled to witness fees, and all three had held that they are not. See *Meadows* v. *United States Marshal*, 434 F.2d 1007, 1008 (5th Cir. 1970) (convicted "prisoners are in the custody of [the government], and they are not in a position similar to ordinary witnesses who must incur private costs in order to testify"), cert. denied, 401 U.S. 1007 (1971); *Marchese* v. *United States*, 453 F.2d 1268, 1270-1271 (Ct. Cl. 1972); 18 Comp. Gen. 609, 610 (1939). Following the 1978 amendments to Section 1821, two more courts of appeals reached the same conclusion. See *United States* v. *Garmany*, 762 F.2d 929, 933 n.2 (11th Cir. 1985); *In re Grand Jury Matter (Witness RW)*, 697 F.2d 103 (3d Cir. 1982), aff'g *In re Witness Fees For Prisoner*, 533 F. Supp. 401, 402-403 (E.D. Pa. 1982). In addition, the Department of Justice promulgated regulations in which the Department formally took the position that witnesses in custody, other than detained material witnesses, are not entitled to witness fees under Section 1821. 51 Fed. Reg. 16,171, 16,173 (1986), codified at 28 C.F.R. 21.4(d).

While an argument based on congressional acquiescence may sometimes be a weak substitute for a clear statement of congressional purpose, the argument is at its strongest when the decisions and practice are familiar, uniform, and longstanding. See *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457 (1978); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 365-366 (1951). In the case of the witness fee statute, the uniform line of judicial decisions and administrative rulings, as well as the consistent day-to-day practice establish that Congress has been legislating against a background in which prisoners have never been deemed eligible to receive witness fees.[23] Moreover, Congress has repeatedly revisited the witness fee statute without ever explicitly providing witness fees to convicted prisoner witnesses, even though it has regularly addressed the closely related

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[23] State practice appears to accord with the federal practice of not paying convicted prisoners witness fees, and for the same reasons. See 1940 Op. Fla. Att'y Gen. 89, 90; 10 Op. Wisc. Att'y Gen. 1168, 1171-1174 (1921). As one state attorney general observed:

> It should be borne in mind that the process served in this case [*i.e.*, where a convicted prisoner is brought to court to testify] is not a subpoena; the court is not dealing with the witness as such, but is dealing directly with the custodian of the convict. As far as the convict is concerned, his status does not change in any respect by virtue of the fact that he gives testimony in court. The time consumed does not belong to the convict. There is no justice or reason in permitting him to collect a fee for appearing as a witness in court while he is in the custody of the prison authorities.

Id. at 1173.

topic of providing fees for detained material witnesses. In this setting, Congress's failure to change the statute in a manner that would overrule the universal practice and the uniform line of decisions provides further evidence that the decision of the court of appeals denying witness fees to petitioner correctly reflected Congress's will.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1990

APPENDIX

Title 28, United States Code, Section 1821, provides in pertinent part:

Per diem and mileage generally; subsistence

(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

* * * * *

(b) A witness shall be paid an attendance fee of $30 per day for each day's attendence. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

(c)(1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.

(2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of

the Federal Government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distances adopted by the Administrator of General Services.

(3) Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920 of this title.

(d)(1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

(2) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5, for official travel in the area of attendance by employees of the Federal Government.

(3) A subsistence allowance for a witness attending in an area designated by the Administrator of General Services as a high-cost area shall be paid in an amount not to exceed the maximum actual subsistence allowance prescribed by the Administrator, pursuant to section 5702(c)(B) * * * of title 5, for official

travel in such area by employees of the Federal Government.

(4) When a witness is detained pursuant to section 3149 * * * of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.[1]

(e) An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 242(b) of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive fees or allowances provided by this section.

Title 28, United States Code, Section 1825, provides:

Payment of fees

(a) In any case in which the United States or an officer or agency of the United States is a party, the United States marshal for the district shall pay all fees of witnesses on the certificate of the United States attorney or assistant United States attorney, and in the proceedings before a United States magistrate, on the certificate of such magistrate, except that any fees of defense witnesses, other than experts, appearing pursuant to subpoenas issued upon approval of the

[1] 18 U.S.C. 3149, the federal material witness statute, is currently codified at 18 U.S.C. 3144.

court, shall be paid by the United States marshal for the district—

(1) on the certificate of a Federal public defender or assistant Federal public defender, in a criminal case in which the defendant is represented by such Federal public defender or assistant Federal public defender, and

(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in a criminal case in which a defendant is represented by such other counsel.

(b) In proceedings in forma pauperis for a writ of habeas corpus, and in proceedings in forma pauperis under section 2255 of this title, the United States marshal for the district shall pay, on certificate of the district judge, all fees of witnesses for the party authorized to proceed in forma pauperis, except that any fees of witnesses for such party, other than experts, appearing pursuant to subpoenas issued upon approval of the court, shall be paid by the United States marshal for the district—

(1) on the certificate of a Federal public defender, in any such proceedings in which a party is represented by such Federal public defender or assistant Federal public defender, and

(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in any such proceedings in which a party is represented by such other counsel.

(c) Fees and mileage need not be tendered to a witness upon service of a subpoena issued on behalf of the United States or an officer or agency of the United States, upon service of a subpoena issued on behalf of a defendant represented by a Federal public defender, assistant Federal public defender, or other attorney appointed pursuant to section 3006A of title 18, or upon service of a subpoena issued on behalf of a party authorized to proceed in forma pauperis, if the payment of such fees and mileage is to be made by the United States marshal under this section.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD S. DEMAREST,

Petitioner,

v.

JAMES A. MANSPEAKER, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

Respondents, having failed to so much as enter an appearance below, advance for the first time in their brief here two new contentions that would deny Petitioner his fee. First, Respondents contend this Court may avoid the merits of Petitioner's claim under 28 U.S.C. § 1821 because, they assert, he failed to satisfy two requirements of 28 U.S.C. § 1825. Second, Respondents argue that Petitioner was not "in attendance" at the trial because the procedure used to compel his attendance was a writ rather than a subpoena, an interpretation of 28 U.S.C. § 1821 that has not occurred to any court construing the statute.

Respondents' first contention is not within the scope of review granted by this Court, and, in any event, is not fairly supported by the record. Their second contention is simply a novel and unsupported attempt to evade the ordinary meaning of the statutory language.

I. Respondents' Belated Efforts To Avoid The Merits Of Petitioner's Claim Should Be Rejected

Respondents' first contention is that Petitioner failed to satisfy two requirements of 28 U.S.C. § 1825 (Resp. Br. at 8-9) merely because his *pro se* pleadings (Resp. Br. at 6) do not recite compliance with them.[1] This belated effort to

---

[1] Respondents identify two "requirements." One is that Petitioner must have been summoned by a subpoena rather than by a writ of habeas corpus ad testificandum. This is, in reality, not a claim of pleading deficiency but a repetition of Respondents' substantive contention regarding the proper reading of sections 1821 and 1825, and is responded to *infra* in section II. The second asserted requirement is that Petitioner have obtained an affidavit regarding his attendance from the attorney for the criminal defendant who called him as a witness. Resp. Br. at 8.

avoid the merits of Petitioner's claim is both untimely and mistaken.

The new issue Respondents present differs substantially from the question presented by the petition for certiorari, which raised only 28 U.S.C. § 1821,[2] and it is not fairly included within that question. For this reason alone, the Court should decline to consider it. Sup. Ct. R. 14.1(a). Moreover, the record in this case contains no mention of this issue. Nor was it mentioned by the district court or the court of appeals (or, for that matter, by Respondents in their brief in opposition to certiorari).

In *Lytle* v. *Household Mfg., Inc.*, 110 S.Ct. 1331 (1990), decided last term, this Court adhered to its usual rule and declined to consider a claim which was neither included in the grant of certiorari nor raised below. *Id.* at 1336 n.3. *See also Jenkins* v. *Anderson*, 447 U.S. 231, 234 n.1 (1980); *Federal Trade Comm'n* v. *Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983). Respondents do not suggest that this case presents an exception to the usual rule, and provide no explanation for their failure to raise the issue below.

Additionally, Respondents are mistaken that "petitioner's own pleadings" fail to show his entitlement to a witness fee under 28 U.S.C. § 1825, Resp. Br. at 6, and that there is therefore an alternative ground "in the record" for affirmance. Resp. Br. at 9 n.4. Petitioner's Petition and Complaint below, prepared *pro se*, specifically stated his claim to a fee under 28 U.S.C. § 1825. *E.g.*,

[2] Respondents concurred. Their brief in opposition to certiorari stated the Question Presented as follows: "Whether a state prisoner who serves as a witness in federal court proceedings is entitled to a witness fee under 28 U.S.C. 1821?"

Joint Appendix, pp. 3, 4, 5.[3] Although the claim may have been inartfully pleaded, Petitioner's pleading was plainly sufficient to allege compliance with the procedural requirements of section 1825 under the "notice pleading" standards of the federal rules endorsed by this Court. *See Conley* v. *Gibson*, 355 U.S. 41, 47-48 (1957). Moreover, Respondents made no motion for clarification, or indeed, any response at all to Petitioner's pleadings. Respondents are incorrect in saying this record provides an alternative basis for affirming the judgment below.

II. Section 1821 Does Not Require A Witness To Be Subpoenaed To Be "In Attendance" At Trial

Respondents' principal contention, offered here for the first time, is that only a witness responding to a subpoena is "in attendance" and therefore entitled to be paid a witness fee under section 1821, since Petitioner was brought to court pursuant to a writ of habeas corpus ad testificandum, he does not qualify.[4] This theory does not withstand examination. It is contradicted by this Court's opinion in *Hurtado*, is inconsistent with other judicial

[3] Petitioner alleged in his complaint that the defendant clerks had "the duty . . . of certifying to the United States Marshal an affidavit respecting Plaintiff-Petitioner's court attendance." Joint Appendix, p. 3. Beyond this, the record is silent regarding an affidavit of Petitioner's attendance at Court.

[4] At times Respondents appear to argue that Petitioner is additionally required to meet a "subpoena" requirement imposed by 28 U.S.C. § 1825, governing the procedure by which defense witnesses are compensated. Resp. Br. at 11. Apart from the fact that this question was not raised below and certiorari was not granted to review it, Respondents offer no reason why the word "subpoena" should not be broadly defined to include all forms of compelled attendance. See discussion, *infra*, at 8-9.

decisions, and lacks any firm basis in the history of the statute.

A. Hurtado Contradicts Respondents' Interpretation of "In Attendance"

Section 1821 grants a fee to "a witness in attendance" at a trial. Respondents would define "in attendance" as incorporating a subpoena requirement, citing this Court's opinion in *Hurtado v. United States*, 410 U.S. 578 (1973), as support for their view. Precisely the opposite is true. As the *Hurtado* opinion makes plain, the witnesses in that case were not brought to court by subpoena. 410 U.S. at 579 and n.1. In fact, they were arrested for failure to post bond pursuant to former Rule 46(b) of the Federal Rules of Criminal Procedure, *committed to the custody of the United States Marshal, incarcerated by the marshal and produced by him at trial to provide testimony. Id.* This Court expressly held that such witnesses are "in attendance" at trial.[5]

Recognizing the inconsistency in their position, Respondents later admit that the witnesses in *Hurtado* were not summoned to court by subpoena. Resp. Br. at 13

[5] "We conclude that a material witness who has been incarcerated is entitled to the $20 compensation for *every day of confinement during the trial* or other proceeding for which he has been detained. On each of those days, *the two requirements of the statute are satisfied—there is a court in session and the witness is in necessary attendance.*" 410 U.S. at 586-87.

It should be emphasized that the holding referred to in *Hurtado* was based on the witnesses' rights under the general witness fee statute, the precursor of section 1821(b), and *not* on the special provision for detained material witnesses, the forerunner of section 1821(d)(4). Thus the Court's analysis of "in attendance" was not based on any special provision applicable only to detained material witnesses.

n.7. At that point, Respondents retreat to a view that, while a subpoena is not required, the process used must be "something like" a subpoena: "[A] detained material witness is 'in attendance' at the court before which he is to testify, since he is summoned by a process that *in effect amounts to* service of a subpoena." *Id.* (emphasis added). Even assuming that some form of compulsory process may be necessary,[6] Respondents do not explain why the detention procedure at issue in *Hurtado* is more like a subpoena than the writ of habeas corpus ad testificandum employed here.

Respondents' argument is simply unconvincing. If Petitioner Demarest had not been a convicted prisoner and had been subpoenaed to testify he would be entitled to a fee. If he had been detained as a material witness he would have been entitled to a fee. But because he was in prison, and therefore was summoned pursuant to a writ of habeas corpus, he is not.

Respondents' rationalizations, offered to justify a result which has no basis in common sense or in the operative language of the statute, are simply proxies for the propo-

[6] Both subsections (a) and (b) of section 1825 refer to "subpoenas issued on approval of the court." The common-sense purpose of this language is not to insist upon the use of a writ of subpoena rather than some other instrument, but rather to insure that defense witnesses called at the government's expense have been determined by the court to be material and necessary under the procedure described in Fed. R. Crim. P. 17(b). *See* S. Rep. No. 615, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. Code Cong. & Ad. News 2901-04 (explaining need to conform section 1825 and Rule 17(b)); H.R. Rep. No. 99-417, 99th Cong., 2d Sess. 18 (1986), *reprinted in* 1986 U.S. Code Cong. & Ad. News 6165, 6180. Under Rule 17(b), courts issue both subpoenas and writs of habeas corpus ad testificandum for necessary defense witnesses. *See* p. 7, *infra*.

sition that prisoners are not entitled to fees because they do not deserve to be paid. That may be the view of the Respondents, but it is not a limitation enacted by Congress.[7]

B. Respondents' Interpretation Is Inconsistent With Judicial Decisions Concerning Witness Fees

Respondents cite no judicial decisions holding that a witness' right to attendance fees depends on the precise form of compulsory process used to secure his presence.[8] In fact, cases on this and related subjects suggest just the opposite conclusion.

None of the reported cases concerning prisoners holds them ineligible for fees under section 1821 because they appeared pursuant to a writ rather than a subpoena. *See* Pet. Br. at 30-32. Moreover, in cases dealing with taxation of costs under section 1920 of Title 28, the issuance of a subpoena is not a prerequisite to assessing witness fees. J. Moore, W. Taggart & J. Wicker, 6 *Moore's Federal Practice* ¶ 54.77 [5.-1] at 54-436 (2d ed. 1988). For example, in *Castro* v. *United States*, 104 F.R.D. 545, 549-50 (D. Puerto Rico), *aff'd*, 775 F.2d 399 (1st Cir. 1985), a civil case, the court held that a witness who was not even subpoenaed (because he was beyond the 100-mile reach of the court's subpoena power) was statutorily entitled to receive witness attendance fees under section 1821(b), and thus that defendant could tax the cost of such fees to plaintiffs. *See also Dasher* v. *Mutual Life Insur. Co.*, 78 F.R.D. 142 (S.D. Ga. 1983).

In criminal cases under Fed. R. Crim. P. 17(b), federal courts routinely equate the term "subpoena" with "writ of habeas corpus ad testificandum" in connection with compulsory process to prisoner witnesses. *E.g.*, *United States* v. *Greschner*, 802 F.2d 373 (10th Cir. 1986), *cert. denied*, 480 U.S. 908 (1987) (affirming trial court's denial of defendant's application to "subpoena" three inmate witnesses while granting application to "subpoena" others); *United States* v. *Fountain*, 768 F.2d 790 (7th Cir.), *amended by* 777 F.2d 345 (7th Cir. 1985) (affirming trial court's denial of defendant's request to "subpoena" prison inmates under Rule 17(b)); *United States* v. *Garza*, 664 F.2d 135 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982) ("appellants sought to subpoena inmates from various correctional facilities"); *United States* v. *Herron*, 551 F.2d 1073 (6th Cir. 1977) (affirming district court's refusal to issue a "subpoena" to inmate witness); *United States* v. *Plemons*, 455 F.2d 243 (10th Cir. 1972) (using both terms, alternately and interchangeably, in referring to compulsory process for inmates). While there is technically a difference in the two forms of process, it is plain from these cases that federal courts consider them synonymous.[9]

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[7] Respondents liken prisoners to parties in a lawsuit, and suggest that both are ineligible for fees because they do not "attend" the trial. Resp. Br. at 10. Petitioner believes the analogy is far-fetched, and submits that parties are ineligible for the simpler reason that a party is not understood to be a "witness" in the ordinary meaning of that term, even if he testifies. "A real party in interest or a party suing or sued in a representative capacity *is not a witness* for the purposes of the statute, even though he may actually testify at the trial." J. Moore, W. Taggart & J. Wicker, 6 *Moore's Federal Practice* ¶ 54.77[5.-1] at 54-432 (2d ed. 1988). The statute referred to is 28 U.S.C. § 1920, which permits taxation of costs for "fees and disbursements for . . . witnesses." A witness, unlike a party, is a person who is before the court only to give testimony. Petitioner plainly satisfies that definition.

[8] A possible exception is a state attorney general's opinion in 1921, cited in the final footnote of Respondents' brief, which at least mentions the distinction.

[9] Indeed, Fed. R. Crim. P. 17(b) in express terms authorizes only

C. Nothing In The History Of The Witness Fee Statute Supports The Analysis Or Result Urged By Respondents

Respondents trace the 200-year history of the witness fee statutes and refer to numerous legislative and administrative materials associated with that history. Nothing in the cited documents, however, sheds any direct light on the question at issue. Neither Respondents' peculiar definition of "attendance" nor the result they advocate finds any direct support in this ancient record.

Respondents' reliance on these materials is suffused with conjecture and suggestion. Thus, "a number of state laws [in 1807] *suggest* a practice of excluding prisoner witnesses," Resp. Br. at 15 n.11; prisoners "*do not appear to be* the sort of witnesses" entitled to compensation, *id.*; "Congress's use of the term 'summoned' *appears to* have restricted the statute's reach to those witnesses . . . produced by subpoena *or its equivalent*," *id.* at 17; "the express extension of witness fees to . . . detained material witnesses . . . strongly *suggests* . . . that other imprisoned witnesses" were not considered entitled to fees, *id.* at 18; and etc. This discussion is replete with assertions that prisoners have not been "regarded" or "contemplated" as entitled to fees, *e.g.*, Resp. Br. at 13, 17, in an effort to attribute to Congress a deliberate intention for which direct evidence is conspicuously absent. Respondents' formulations demonstrate forcefully the utter lack of any real basis in the legislative

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the issuance of subpoenas, but courts regularly issue writs pursuant to the rule without even discussing the difference, implying that the two are considered functional equivalents by the courts.

history to contradict the plain and evident language of the present statute.[10]

While admitting that their argument based on congressional inaction is a "poor substitute" for actual evidence of Congress' intent, Respondents nevertheless insist that the argument should be given some credence when the existing decisions and practice are "familiar, uniform and longstanding." Resp. Br. at 25. As Petitioner pointed out in his opening brief (at 37-41), there is not the slightest hint that Congress was ever aware of the existence of the decisions and practice referred to by Respondents, or that anyone was "familiar" with them beyond the few parties directly involved. In such a case, the Court cannot attribute a fictional awareness to Congress. *Securities and Exchange Comm'n* v. *Sloan*, 436 U.S. 103, 121 (1978) ("We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents."). *See also Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 336 n.7 (1971); *United States* v. *Calamaro*, 354 U.S. 351, 358-59 (1957).[11]

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[10] Respondents' brief omits any reference to the only two amendments in the statute's history which might have any direct bearing on prisoners' right to fees. In 1926, a phrase was inserted in the statute which could fairly be read to except prisoners from witness fees. *See* Pet. Br. at 40-41 and n.17. In 1948, that possible exception was removed. *Id.* It is telling that, in more than ten pages of argument concerning the statute's history, Respondents have nothing to say about these amendments.

[11] Finally, Respondents urge that Congress was "legislating against a background" in which prisoners have never "been deemed eligible" for witness fees. Resp. Br. at 25. This argument only begs

The final thirteen pages of Respondents' brief can be condensed to a single proposition which Petitioner does not dispute: it has not been administrative practice to pay witness fees to prisoners when they are summoned to court to testify. The question before the Court is whether that practice can be reconciled with the statute.[12] Petitioner submits that it cannot.

CONCLUSION

For the reasons set forth in Petitioner's opening brief, and here, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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the question whether prisoners are *entitled* to receive fees under the statute. Respondents have pointed to no evidence whatsoever that prisoners were ever "deemed ineligible" by Congress. Moreover, Congress is always "legislating against a background" of some kind, but that mere fact cannot be taken to mean that Congress enacts the entire landscape into law, particularly scenery which is invisible beyond the horizon.

[12] Respondents do not argue that administrative practice in this case is entitled to any special deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).